91-66

No. 91-

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VICTOR STEPHENS,
Petitioner,
—against—
THE STATE OF ALABAMA,
Respondent.

On Writ of Certiorari To The Supreme Court of Alabama

APPENDICES D–E

THOMAS W. EVANS
Counsel of Record
THOMAS N. KENDRIS
RICHARD B. BRUALDI
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510–7000

Counsel for Petitioner
Victor Stephens

July 8, 1991

APPENDIX D

Circuit Court of Hale County, Alabama

Direct Examination of Charles S. Stone by Prosecution

Stephens Trial

Record 26–38

CHARLES S. STONE

called on behalf of the State, was duly sworn and testified as follows, to–wit:

DIRECT EXAMINATION

By Mr. Sullivan

Q State your name, please.

A Charles S. Stone

Q How are you employed, sir?

A Special Agent with the Georgia Bureau of Investigation.

Q How long have you been with the Georgia Bureau of Investigation?

A Over 14 years.

Q And what is your position or rank, please, sir?

A Right now, I'm an Assistant Special Agent in charge of Special Prosecution Task Force.

Q All right. And you're with the Georgia Bureau of Investigation?

A Yes.

Q Drawing your attention to an individual by the name of Victor Stephens, did you have occasion to have a conversation with him on or about January 23rd?

A Yes, sir; I did.

Q Where was that conversation?

A At the Carroll County Jail, Investigative Office Section.

Q That's January 23, 1986?

A Yes, sir. Approximately 3:40 p.m.

Q All right. And Carroll County, that's Carroll County, Georgia; is that right?

A Yes, sir.

Q All right. At the time you talked to Mr. Stephens, who was present, sir?

A Myself and A.B.I. Agent, Ed Traylor.

Q All right. Now prior to having a conversation with him on January 23, 1986, at the Carroll County Jail, did you have an occasion to read him his Miranda Rights, sir?

A I read it from my Waiver card.

Q All right. And specifically, if you would, please tell the Court what rights were read to him. Now this is from a card; is that correct?

A Yes.

"You have a right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning. You may decide at any time to exercise these rights and not answer any questions or make any statements."

Q All right. Now, besides yourself and Mr. Traylor, was anybody else present with Victor Stephens?

A No.

Q What was the condition of Mr. Stephens at the time the statement was taken, sir?

A Mr. Stephens was lucid. He was responsive to questioning. He answered that he understood his rights. He appeared to be physically normal with the exception that he was suffering from a gunshot wound to the hand. He was in the custody of the jail and he was a hospital inmate. He was incarcerated in the jail. Again, he was very lucid.

Q All right. Did he appear to be under the influence of any drugs or alcohol?

A No, sir; he did not.

Q All right. Now after his rights were read to him verbally, was there also a Miranda form signed, sir?

A No, sir; not at this interview. There was on the 25th.

Q All right. Now prior to taking a statement from him, did you or anyone in your presence make any promises to him in order to obtain a statement from him?

A No, sir; we did not.

Q Prior to obtaining a statement from him did you or anyone in your presence make any threats to him in order to obtain a statement from him?

A No, sir; we did not.

Q Prior to obtaining a statement from him, did you or anyone in your presence make any inducements in order to obtain a statement from him?

A No, sir.

Q Prior to obtaining a statement from him, did you or anyone in your presence tell him it would be any better or worse in order to obtain a statement from him?

A No, sir.

Q All right. Now after his rights were read to him, did he agree to make a statement?

A Yes, sir; he did. He answered that he understood his rights.

Q All right. And how was this statement taken, sir?

A It was taken — I made notes myself and Agent Traylor made notes per our usual policy. I go back and dictate

any notes I have and they're transcribed into an investigative summary. This is on the interview on January 23rd. On January 25th, that interview, I took a handwritten statement from him.

Q All right. Now concerning this verbal statement, after you made your notes concerning this interview, was it presented back to Mr. Stephens for his signature of the January 23rd statement?

A No, it was not.

Q All right. Now concerning that statement, what did he tell you on that occasion?

A We questioned him concerning how he initially got shot. He stated that he and Christopher Starks had been riding around. He stated he did not know exactly where they were, but he did know they were in Alabama. I explained to him about the armed robbery murder that occurred here in Hale County and at that time he admitted that he and Chris Starks were involved in the shooting. He stated that he was shot by one of the men with a shotgun when he walked in. He stated he didn't know who shot first and he didn't know why the shooting went down. He stated that it was Chris Starks' idea to rob the store. He also related he had been taking cocaine and LSD prior to the robbery and could not remember all of the details. I questioned him concerning how much, what kind of drugs he had taken and he related he bought a couple eight balls of cocaine and some acid or LSD. When I questioned him about the details of the robbery and murder, he related there were two men in the store. One white man and one black man and it was the white man that had shot him with the shotgun. He related — I questioned him concerning dropping a .25 caliber pistol that was

recovered at the scene. He stated he dropped it when he was shot and he also related that they had been in Chris Starks' black Nissan truck. When I explained to him during the search of the truck we had uncovered some food stamps that had been identified as coming from the robbery and murder and that the weapons had been matched ballistically, and I'm quoting now, he says, "You have it just like it was. I don't want to talk about killing them two men anymore." He stated he knew he was going to die and that I could go ahead and put him in the electric chair. At which time, the interview was concluded.

Q All right. Any other conversation with him on the 23rd?

A No.

Q Now that interview was at what time, sir?

A Approximately 3:40 p.m.

Q All right. How long did that interview last, as best you can remember?

A Best of my recollection, probably 45 minutes to an hour.

Q All right. Now your next conversation with Mr. Stephens was on the 25th; is that correct?

A Yes, sir.

Q All right. Drawing your attention to January 25, 1986, did you have an occasion to have a conversation with him at that time?

A Yes, I did.

Q All right. And where was that conversation and who was present?

A Again, it was in the Carroll County Jail. Myself and Chief Deputy Dennis Holloway — excuse me, Chief Investigator.

Q Now that was at the Carroll County Jail; is that correct?

A Yes, sir.

Q All right. And what time did that interview take place and was anybody else present besides Mr. Stephens, Mr. Holloway, and yourself?

A No, sir.

Q All right.

A It took place at approximately 2:25 p.m.

Q All right. Now on that occasion, were his rights read to him prior to taking the statement?

A Yes, sir; from the Miranda form.

Q Do you have a copy of that or is that the original?

A This is a copy.

Q All right. Where is the original.

A It was introduced as evidence in the Defendant's prior trial in Randolph County.

Q All right.

MR. SULLIVAN: Judge, we expect at the time of trial we'll have that original.

MR. GREENE: You want me to make a copy of that?

MR. SULLIVAN: Yes.

MR. MORRIS: I would like to have a copy of his statement.

(Whereupon State's Exhibit No. 1 was marked for identification by the reporter.)

Q (Continuing:) I show you what is marked as State's Exhibit 1 for the purpose of this hearing. I ask you if you recognize that?

A It's the Xerox copy of the statement I obtained on January 25, 1986 from the Defendant.

Q All right. Now drawing your attention first to page one, what is that, sir?

A This is a Miranda Waiver form that I utilized at the jail. The place is Carrol County Jail and the date is January 25, 1986. The time is 2:25 p.m.

"Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to talk to a lawyer for advice before we ask you any questions and have him with you during questioning.

If you cannot afford to hire a lawyer, one will be appointed for you before questioning, if you wish. If you decide to answer questions now without a lawyer being present, you would still have the right to stop answering any questions at any time.

You also have the right to stop answering at any time until you talk to a lawyer."

Then it says, "Waiver of Rights.

I read the statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing and no promises or threats have been made to me and no pressure or coercion of any kind has been used against me." It's signed, "Victor Stephens," witnessed by myself and Dennis Holloway.

Q All right. Now concerning that document that you just read from, sir, Victor Stephens' signature, I believe you stated, is on that document?

A Yes, sir.

Q Were you present at the time his signature was placed on that document?

A Yes.

Q And do you see Mr. Stephens here today, sir?

A Yes, sir; he's seated right there.

Q Is that the same individual that you took your verbal statement from on January 23, 1986?

A Yes, it is.

Q All right. At the time that he signed that Waiver of Rights, that Miranda form, sir, what was his condition on that occasion?

A He was dressed in, I belive, inmate clothing.

Carroll County Inmate Jail clothing. He was responsive to questioning. He was lucid and he didn't appear to be under the influence of drugs or alcohol. He was afforded an opportunity to go to the restroom and was offered coffee and water, I believe, and in general, he appeared receptive to questioning.

Q All right. Did he agree to make a statement?

A Yes, sir; he did.

Q Prior to obtaining a statement from him on that occasion, did you or anyone in your presence make any promises to him in order to obtain a statement from him?

A No, sir.

Q Prior to obtaining a statement from him, did your or anyone in your presence make any threats to him in order to obtain a statement?

A No, sir.

Q Prior to obtaining a statement from him, did you or anyone in your presence make any inducements to him in order to obtain a statement from him?

A No, sir.

Q Prior to obtaining a statement from him, did you or anyone in your presence tell him that it would be better or any worse in order to obtain a statement from him?

A No, sir.

Q Did he make a statement, sir?

A Yes, sir; he did.

Q And how was that statement taken?

A The statement was, as he told it to me, I wrote it down.

I let him read it and sign it.

Q All right. At the time that he had the opportunity to read it and sign it, was it read to him?

A I read sections of it, I believe, and then I presented him with the completed thing when we finished. He looked it over and initialed some mistakes I had made on it. We struck through it and he initialed it and gave it back to me.

Q All right. He had the opportunity to make any changes that he saw fit in that statement?

A Yes, sir.

Q Did he do so?

A No. Other than initial where I struck through some words, he was speaking faster than I could write and I struck through a couple words. I asked him to initial any mistakes or corrections.

Q All right. Did he ask for any changes to be made in that statement?

A No, he did not.

Q All right. Did he sign that statement?

A Yes, he did.

Q And what was that — was that done in your presence?

A Yes, sir.

Q And who witnessed that statement?

A Myself and Dennis Holloway.

Q All right. Now concerning State's Exhibit No.1, what statement did he give you on January 25, 1986 in Carroll County, Georgia, sir?

A "Statement of Victor Stephens.

The only two robberies I ever did with Christopher Starks (Peabody) were in Alabama. I don't know anything about Robert Saxons murder.

It was Peabody's idea to rob the store the other night near Wesdo. He shot the man with a .22 pistol. I don't know how much money we got total. Terry stayed at the car. I stayed on the outside and Peabody went in. I got a little over $200. Terry got 30 something. When we left the store Peabody got in the trunk of my car and we left. We crossed a bridge on the way back and threw out the checks and some beer cans. Me and Terry went home after that.

The other robbery I just walked into the store after Peabody went in. He had been in a while so I went in to see what was happening. When I walked in, the white man started shooting with a shotgun. I just pulled out my pistol and started shooting. We left and came back to Georgia. We went to Charlie Dalla's house. Charlie Dallas carried me to the hospital.

Q Did Peabody shoot anybody in Alabama?

A I emptied my .25 but I don't know about him.

Q What kind of gun did Peabody have?

A. He had a .22 and a .32. I had bought the .25 from him on Friday or Saturday. He bought some .25 and .22 shells at Wal–Mart in Carrollton."

Signed, "Victor Stephens."

Q All right. And you saw him sign that document and your signature is there as a witness?

A That's correct.

Q All right. Now drawing your attention to January 28, 1986, were you present when a statement was taken?

A No, I don't believe so.

Q All right. So concerning Victor Stephens, those were the only two statements you took concerning the case in Hale County?

A That's correct.

Q All right. At the time that these statements were taken from him on January 23rd and January 25th, was he under arrest, sir?

A Yes, sir.

Q What was he under arrest for?

A I arrested him on a fugitive warrant out of Randolph County, Alabama on a charge of armed robbery and the Alabama equivolent of aggravated assault.

Q That was the purpose for him being in the Carroll County Jail?

A Yes.

MR. SULLIVAN: Pass the witness.

Circuit Court of Hale County, Alabama
Direct Examination of Charles Stone by Prosecution
Stephen's Trial
Record 612–627.

CHARLES STONE

called on behalf of the State, was duly sworn and testified as follows, to wit:

DIRECT EXAMINATION

BY MR. SULLIVAN:

Q State your name, please

A Charles Stone.

Q And how are you employed?

A Special Agent with the Georgia Bureau of Investigation.

Q And, Charles, how long have you been in law enforcement, sir?

A Been in law enforcement a little over 15 years. I've been employed by the Georgia Bureau of Investigation for a little over 14 years.

Q A little over 14 years?

A Yes, sir.

Q Now GBI, that's Georgia Bureau of Investigation, sir?

A Yes, sir; that's correct.

(Whereupon the following proceedings were held in the presence of, but out of the hearing of the jury:)

MR. MORRIS: If the Court will allow me, I want a continuing objection rather than having to object to every aspect of this line of questioning. I request of the Court and reserve — I want to preserve the record that I object to any out–of–court confessions or any statements made by the Defendant and if I can protect the record that way, I would appreciate it.

MR. SULLIVAN: That's fine.

MR. MORRIS: Then it would remove any necessity for my objecting. I do not waive anything. I do not consent or confess anything as to any aspect of the confessions.

MR. SULLIVAN: We understand.

THE COURT: *You have a continuing line of objection.*

(Whereupon the following proceedings were resumed in the presence and hearing of the jury:)

Q (By Mr. Sullivan, Continuing:) What duties do the GBI —

A Basically, we serve in the same capacity as the ABI in Alabama. We're an assistance or joint agency for the local and county law enforcement in the areas of general criminal investigation such as homicides, robberies. We work at the request of local law enforcement agencies, Sheriff's department, police departments, judges. They

can request our services. We also have jurisdiction in organized crime and narcotics.

Q Now, do you have a rank or position, sir?

A Yes. I'm Assistant Special Agent in charge of, and the full name is Special Prosecution Task Force and what it entails is the investigation of organized crime and political corruption in the State of Georgia. At the time of this occurrence, I was working as a field agent in the Thomaston field office in the area of homicide and armed robberies.

Q Carroll County was in your area?

A Yes, it was.

Q Now, drawing your attention to this particular matter involving Victor Lamar Stephens, sir, did you have the occasion to see him in Georgia after January 20, 1986, sir?

A Yes, sir. On January 21st, I saw Mr. Stephens in the hospital in Carrollton, Georgia.

Q All right. That was the hospital in Carrollton, Georgia?

A Yes.

Q What was the purpose of seeing him at that time?

MR. MORRIS: Objection to the purpose. He can testify to what he did.

Q (Continuing:) What did you do?

A Placed the Defendant under arrest.

Q Now that was at the hospital in Carroll County; is that correct?

A That's correct.

Q Now after doing that, on a later date, drawing your attention to January 23, 1986, did you have the occasion at that stage to take a statement from him, sir?

A Yes sir; I did. On that date, myself and ABI Agent Ed Trailer, interviewed the Defendant at the Carroll County Jail in the investigative office section.

Q Do you see Victor Stephens in the courtroom here today, sir?

A Yes, sir; I do. He's the black male seated at the table on my right wearing a dark colored jacket and I believe with a striped shirt.

Q Let the record reflect that the witness has pointed to the Defendant, Victor Lamar Stephens. Now I believe you stated that you and Ed Trailer and the Defendant were present at the Carroll Count Jail; is that correct?

A Yes, sir.

Q Was anybody else present at the time that a statement was taken from him, sir?

A No, sir; not at this time.

Q When you first observed him at the Carroll County Jail, what was his condition, sir?

A He was clothed in jail clothes. He had a bandaged left hand. He was lucid. He was responsive to questioning. He knew where he was.

MR. MORRIS: We object to these conclusions on behalf of the law enforcement officer. He can testify to what he observed, he can't testify to – –

THE COURT: State your question again.

MR. MORRIS: It was unresponsive. The question was all right, the answer was not responsive.

Q (Continuing:) At the time you took the statement from him, if you would, please tell the ladies and gentlemen of the jury what his condition was, sir. Tell the jury what you observed about him.

A He was mentally alert. I would ask him questions, "Do you know where you are," and this type thing and he was responsive. He knew where he was. He knew who he was talking to.

MR. MORRIS: Objection to him testifying to what Mr. Stephens supposedly knew. He cannot testify to that, Judge. We object to that question.

MR. SULLIVAN: He stated what he observed. I think he can go into that.

MR. MORRIS: He's testifying to what Mr. Stephens knew. There's no way for anyone to know that.

THE COURT: I agree, there's no way that he could know what he knew. But he can testify that that's what – –

that's the way he appeared to him on that occasion. That's admissible.

Q (Continuing:) Go ahead.

A Yes, sir. Before the interview, he was afforded an opportunity — we asked him if he needed to go to the restroom. We offered him coffee, water, something to drink. At this time, I advised him of his rights using a standard GBI Rights Waiver card.

Q All right. Now you stated that you advised him of his rights.

A Yes, sir.

Q Specifically, please tell the ladies and gentlemen of the jury how that was done.

A At this time, we're issued standard American warning cards. I took my card from my credential case and advised him of his rights.

Q All right. And you read them from the card; is that correct?

A Yes.

Q Is that the card that you had on January 20, 1986?

A Yes, sir; it is.

Q If you would, please tell the ladies and gentlemen what rights were read to him on January 23, 1986, at the Carroll County Jail.

A "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford a lawyer, one will be appointed without cost to you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time you wish." I asked him if he understood each of his rights as I explained them to him and would he be willing to talk to me.

Q When you asked him if he understood those, what did he say, sir?

A Yes, sir; he did.

Q And did he agree to talk to you at that time, sir?

A Yes, sir; he did.

Q All right. Now you were aware as to the injury to his hand; is that correct, sir?

A Yes, sir; I was.

Q All right. Did he appear to be under the influence of any drugs or alcohol on that occasion, sir?

A No, sir; he was not. Again, he was responsive to questioning. His pupils dilated and responded to light. He was coherent in speech. He didn't exhibit any drunken staggering or anything of that nature.

Q All right. Concerning his hand, please, sir, did he ask for any medical attention while you were talking to him?

A No, sir; he did not.

Q Did you ever refuse him any medical attention or anything, sir?

A No, sir; I did not.

Q Now prior to taking the statement from him on January 23, 1986, did you or anyone in your presence make any promises to him in order to obtain a statement from him?

A No.

Q Prior to taking a statement from him, did you or anyone in your presence make any inducements to him in order to obtain a statement from him?

A No.

Q Prior to obtaining a statement from him, did you or anyone in your presence make any threats to him in order to obtain a statement from him?

A No, we did not.

Q Prior to your obtaining a statement from him, did you or anyone in your presence tell him that it would be any better or any worse in order to obtain a statement from him?

A No, sir; we did not.

Q And did he agree to make a statement?

A Yes, sir; he did.

Q All right. Now was that a written statement or an oral statement or what, sir?

A This particular stage, it was oral statement. I was asking questions and he was responding to the questions.

Q All right. Now concerning this statement that was taken on January 23, 1986, if you would, please tell the ladies and gentlemen how that statement was taken, sir. What happened?

A We began asking the Defendant concerning questions about how he got shot. He stated that he and Christopher Starks had been riding around prior to him getting stopped. He stated that he didn't know exactly where they were, but he did know they were in Alabama. When I explained the Hale County armed robbery/murder to him, I related the general facts, case facts as I knew them. He admitted that he and Christopher Starks were involved in the shooting. Victor related that he was shot by one of the men in the store with a shotgun when he walked in. He stated that he did not know who had shot first and he didn't know why the shooting had gone down. I asked him whose idea it was to pull the robbery and he realted it was Christopher Starks' idea to rob the store. Victor also related he had been taking LSD and cocaine prior to the robbery and therefore, couldn't remember all of the details. I questioned him concerning how much drugs he had taken and what kind and he related that he had taken — he bought a couple eight balls of cocaine in a game room and some acid or LSD. When questioned about the details of the robbery/murder, he related that there were two men in the store. One was white and the other was a black man and that it was a white man who had shot him with the shotgun. Stephens related that at this time that was when he dropped his .25 pistol. When I

questioned him concerning the vehicle they were riding in, he related that it was Christopher Starks black Nissan truck. I explained to him the food stamps and – –

MR. MORRIS: I object to what he explained, what the officer explained. Now the statement by the Defendant, I'm not objecting to, but I am objecting to any statements made by the officer.

MR. SULLIVAN: I believe he can state as to what this conversation was between the two of them.

MR. MORRIS: That's my objection to it.

THE COURT: Overruled.

MR. MORRIS: We reserve an exception.

Q (Continuing:) Go ahead.

A I explained to him that the food stamps taken out of the truck came from the Hale County store and that the weapons had been matched ballistically. He spoke up and stated, and this is a quote from him, "You have it just like it was. I don't want to talk about killing them two men anymore." He then stated that he knew he was going to die and for me to go ahead and put him in the electric chair. At this time, the interview was concluded.

. . .

Q All right. Thank you. Now drawing your attention to January 25, 1986, did you have an occasion or have a separate conversation with Victor Stephens on that occasior, sir?

A Yes, sir. On Saturday, January 25, myself and Investigator Dennis Holloway with the Carroll County Sheriff's Office interviewed Victor at the Carroll County Jail. He was again advised of his rights and signed a written waiver.

Q All right. Now let me show you what is marked as State's Exhibit No. 18, and I ask you if you can recognize State's Exhibit No. 18.

A Yes, sir. This is the original Rights Waiver I read from at the jail which he signed.

Q All right. Now the signature on that document at the bottom, sir, is whose signature?

A The Defendant's, Victor Stephens's signature is at the bottom and myself and Dennis Holloway.

Q There's some additional writing on that document. Whose writing is on there?

A The upper right–hand side is the date, place and time of the interview and that is my writing.

Q All right. Now I believe you stated that that was Victor Stephen's signature on that document?

A That's correct, yes.

Q Were you present at the time he placed his signature on that document?

A Yes, sir; I was.

Q And were you aware, as you have stated previously, that he had a wound to his hand?

A Yes, sir.

Q If you would, please relate as to how he signed that document.

A It's my understanding that the Defendant was left handed. He stated he was. He signed with his right hand, his left hand was still bandaged when I obtained the signed Rights Waiver.

Q All right. Now drawing your attention to State's Exhibit Number, I believe it's 18.

A That's correct.

Q Specifically, what rights were read to him on January 25, 1986?

A "Before we ask you any questions, you must understand your rights:

1. You have the right to remain silent.

2. Anything you say can and will be used against you in court.

3. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

4. If you cannot afford a lawyer, one will be appointed without cost to you before any questioning if you wish.

5. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time you wish.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

And it's signed "Victor Stephens," witness, myself and Investigator Dennis Holloway.

Q All right. Now, I believe you stated you and Dennis Holloway were present?

A Yes.

Q Anybody else besides the two of you with Victor Stephens on this occasion?

A No, sir.

Q All right. And what was his condition and appearance on this date?

A Basically, the same as before. He was responsive to questioning. He was again asked if he wanted to go to the bathroom or to have coffee or water, that type thing. He had no appearance of being under the influence of any drugs, alcohol or anything of that nature. That was almost a foregone fact since he had been incarcerated

prior to this and didn't have access alcohol. He was totally responsive and lucid.

Q Now drawing your attention again to the injuries to his hand. Did he ask for any medical attention on January 25, 1986?

A No, sir; he did not.

Q Was any medical attention refused to him by yourself or Sgt. Holloway?

A No.

Q Prior to taking the statement of January 25, 1986, did you or anyone in your presence make any promises to him im order to obtain that statement from him?

A No, sir; we did not.

Q Prior to taking the statement from him, did you or anyone in your presence make any threats to him in order to obtain this statement from him?

A No, sir.

Q Prior to obtaining a statement from him, did you or anyone in your presence make any inducements to him in order to obtain a statement from him?

A No, sir; we did not.

Q Prior to obtaining a statement from him, did you or anyone in your presence, tell him it would be any better or any worse in order to obtain a statement from him?

A No, sir; we did not.

Q Did he agree to make a statement?

A Yes, sir; he did.

Q All right. Now drawing your attention to January 25, 1986, how was that statement taken?

A The statement was taken again and I was asking the questions and at this time, I was writing his responses down, giving a narrative as I went. I wrote it in my hand.

Q I show you what is marked as State's Exhibit No. 54, and I ask you if you can recognize that, sir?

A Yes, sir; I can. This is the statement I took.

Q All right. That's the statement you took on January 25, 1986?

A Yes, sir; it is.

Q All right. And I draw your attention to two separate places on that document. There's a signature on there. Whose signature is that, sir?

A This is the Defendant's signature, Victor Stephens.

Q And were you present at the time he signed that document, sir?

A Yes, sir; I was.

Q And did he sign it in your presence?

A Yes, sir.

Q Now I also draw your attention to — there are several initials on there. Whose initials are they?

A Those are the Defendants. I made spelling errors, grammatic errors. I struck those words. I asked the Defendant when he read it to initial any mistakes and these are his initials next to those mistakes.

Q Was Mr. Stephens given the opportunity to make any corrections to that document?

A Yes, sir.

Q Was he given the opportunity to read that document?

A Yes, sir.

Q Was that document read to him?

A Yes, sir; it was

Q And who read it to him?

A Myself.

Q Now concerning the statement that he gave you — going back to State's Exhibit No. 54, the statement itself. There's part of it that is written and the other part is a "Q" and "A". If you would, explain that to me.

A In order to clarify points that came up during the statement at the end of the narrative, I asked him questions and his answers are preceded with an "A", and my questions are preceded by a "Q".

Q All right. Now drawing your attention to State's Exhibit No. 54 and – –

MR. SULLIVAN: Your Honor, we would like to offer State's Exhibit No. 54 into evidence at this time.

THE COURT: If there are no objections, it will be admitted.

Q (Continuing:) If you would, please read the statement Stephens gave on January 25, 1986.

A "The...robbery, I just walked into the store after Peabody went in. He had been in a while so I went in to see what was happening. When I walked in, the white man started shooting with a shotgun. I just pulled out my pistol and started shooting. We left and came back to Georgia. We went to Charlie Dalla's house. Charlie Dallas carried me to the hospital.

Q Did Peabody shoot anybody in Alabama?

A I emptied my .25 but I don't know about him.

Q What kind of gun did Peabody have?

A He had a .22 and .32. I had bought the 25 from him on Friday or Saturday. He bought some .25 and .22 shells at Wal–Mart in Carrollton." Signed, "Victor Stephen."

Q All right. Now, Charles, besides those two statements, you were not present during any other conversation with Mr. Stephens; is that correct?

A That's correct.

. . .

Circuit Court of Hale County, Alabama
Direct Examination of William E. Traylor by Prosecution
Stephens Trial
Record 654–671

WILLIAM EDWARD TRAYLOR

called on behalf of the State, was duly sworn and testified as follows, to wit:

DIRECT EXAMINATION

BY MR. GREENE:

Q State your name for the ladies and gentlemen of the jury.

A William Edward Traylor.

Q Where are you employed, sir?

A State of Alabama, Department of Public Safety. I'm a Criminal Investigator.

Q And how long have you been in law enforcement, sir?

A Probably 24 and a half years.

Q And in what capacity do you presently serve, sir?

A I'm a State Trooper Sergeant.

Q And what are your duties with the State of Alabama and the State Troopers?

A My duties at this time for the past 14 years, have been as a Criminal Investigator. As such, I investigate major crimes for the State of Alabama, and also assist other agencies such as the Sheriff's Department and Police

Departments with investigations of major crime within their jurisdiction.

Q Now, sir, specifically with reference to the case we're here about today concerning Mr. Pitkins and Mr. Bailey, on January 20th, here in Hale County, did you assist or participate in that investigation?

A I did.

Q All right. Now you basically are assigned to what area of the state?

A I'm assigned to five counties in Eastern Alabama. They're Calhoun, Talladega, Clay, Randolph and Clayburn. I work other parts of the state if need.

Q All right. Are you familiar with Carroll County, Georgia?

A I am. It joins my area over there in Clayburn County and Randolph County.

Q What towns or cities are there in Carrollton, Georgia?

A The closest city is Bowden, Georgia, and the next city is Carrollton, Georgia, which is the county seat.

Q And what towns or cities are there on the Alabama side of it that you work for?

A Wedowee.

Q Now in the course, sir, of your duties in this case, did you have occasion to come into the presence of this Defendant in this matter on the 28th of January, 1986?

A I did.

Q Do you recognize him here today?

A Yes, I do.

Q Have you ever had occasion to see or be around him prior to that time sir?

A Yes, sir; I did.

Q On the 28th, sir, where did you come into his presence?

A At the Sheriff's Office and Jail, the Public Safety Complex in Carrollton, Georgia.

Q Who else was present with you at that time, sir?

A There was Chuck Gibson and Larry Yates and Officer Boyd an Investigator with the Alabama Bureau of Investigation.

Q All right. And do you know where Chuck Gibson was assigned? What area he worked?

A Chuck worked out of Selma which included Hale County, Alabama.

Q And Larry Yates, do you know where he was assigned to work?

A Larry worked out of Demopolis. He also covers Hale County.

Q Now on this occasion, sir, how did the Defendant come into your presence? Did you get him or somebody bring him out to meet with you or how did you get together?

A He was brought to the investigator's office there by the jailer. We told the jailer that we needed to talk to him.

Q At that time, sir, did you introduce yourselves to him?

A Yes, sir; I did.

Q And the other officers?

A Yes, sir.

Q Did you go over, sir, what is generally referred to as his Rights or his so–called Miranda Rights with him on that occasion?

A Yes, sir; I did.

Q How did you do that?

A I advised him his rights right from a standard Department of Public Safety DPS Form 30, it's a standardized Rights Waiver our department uses and furnishes us for use to use.

Q All right. And did you, sir, on that occasion — would you tell us how it was that you used that form. That is, you read it and had him read it or how did you go about that?

A I read it to him and I also had him read it and asked him if he understood it and he said he did understand it and I asked him to sign his signature that he understood it. He

signed his signature and I witnessed it and Corporal Chuck Gibson witnessed it.

Q After you went over that with him, did you ask him if he was willing to speak to you?

A Yes.

Q Did he agree to speak with you on that occasion?

A Yes.

Q Do you have the original of that form, sir?

A No, sir; I believe that Investigator Chuck Gibson has the original.

Q When did you begin interviewing the Defendant concerning this case, sir?

A You mean when did I first have the interview?

Q No, sir. This case on this occasion that we're speaking of on the 28th, what time of day did you begin that interview?

A That interview was started at 1:35 p.m. He was advised of his rights at 2:45 from the Rights Waiver.

Q So you began on this case at 2:45; is that correct?

A Yes, sir.

Q Now when did you conclude, sir, in your best judgment?

A I would say approximately 3:45.

Q All right. And during that period of time, sir, did you or anyone in your presence or to your knowledge offer this Defendant any promises or hopes of reward in order to get him to speak to you concerning this matter on that occasion?

A No, sir.

Q Did you threaten, coerce or attempt to threaten or coerce him or offer him any inducement on this occasion to get him to speak to you?

A No, sir; did not.

Q During this time, sir, were you made aware of or did it come to your attention or did you recognize whether or not the Defendant was suffering from the affects of any drugs or alcohol during the course of this interview?

A In my opinion, he was not because -- can I clarify when I say that?

Q Let's leave it in your judgment that he was not.

A All right.

Q Now on that occasion, sir, were you familiar with any injuries or wounds that he might have had?

A I was.

Q And what was that?

A A gunshot wound to the left hand.

Q All right. Did he complain of any problem or difficulty with that during this period of time?

A No, sir; he did not.

Q And to your knowledge, was he on any medication or drugs as a result of that injury at that time?

A No, sir; not to my knowledge.

Q All right.

(Whereupon State's Exhibits Nos. 72 and 73 were marked for identification by the reporter.)

(Whereupon an off–the–record discussion was held between counsel and the Court.)

THE COURT: Ladies and gentlemen, we'll have to take up a matter outside your presence. That will give us an opportunity to have a break. I'll give you a break for 15 minutes. Now I would admonish you again not to discuss this case among yourselves or with anyone else or allow anybody to discuss it with you.

(Whereupon the following proceedings were held out of the presence and hearing of the jury:)

MR. GREENE: Previously, Judge, in private consultation with defense counsel, we're both very aware of this particular problem and this was covered, I think, at the Motion to Suppress hearing. But testimony previously is in the record that the interview began at 1:35 p.m. on this occasion and that is a true fact as has been truly testified to. Now there's a Rights Waiver which is Exhibit No. 10, presently identified as an exhibit in this case. We represent as defense counsel is well aware, that that interview deals with a robbery occurring in a

county, Randolph County, I think, and as such, we do not intend and have never intended to go into it. My question in attempting to establish the length of time he was with the Defendant was perhaps poorly framed, but in any event, it elicited an answer saying that he started at 1:35. The interview in this case began at 2:45, and for the record, Mr. Traylor, I would like to ask you at this time, you did begin your interview with the Defendant, Stephens, at 1:35 p.m., on the 28th; is that correct?

THE WITNESS: That's correct.

MR. GREENE: And you did interview him at that time and at the same place, same city, same circumstances that you've just previously testified about?

THE WITNESS: That's correct.

MR. GREENE: You went over his rights with him at that time?

THE WITNESS: Yes, sir.

MR. GREENE: And you read him all the rights on the page?

THE WITNESS: Yes, sir.

MR. GREENE: And he agreed to speak with you by waiving those rights; is that correct?

THE WITNESS: Yes, sir. I advised him of another Rights Waiver. There are two different cases.

MR. GREENE: Is that State's Exhibit No. 10 that's here?

THE WITNESS: Yes.

THE COURT: Why can't you just say you previously advised him of his rights in another —

MR. GREENE I can do that.

MR. MORRIS: He advised him at 1:30 of his rights and —

MR. GREENE: Advised him again at 2:45.

THE COURT: Just don't give any reason for it. Just you did twice and you did it once prior to that. I think that cures it. You don't want to leave the jury with the idea though that you went on and carried on a conversation with this guy and then decided later sometime —

MR. GREENE: After 1:35 and after the rights were given, I think this is all already covered, but I think I need to go over it. Were any threats, promises or hopes of rewards or coercions or inducements or any attempts on your part to force or coerce or threaten him into speaking with you during the first interview?

THE WITNESS: Was not.

MR. GREENE: All right. Y'all did, of course, discuss another separate robbery after the 1:35 p.m. Rights Waiver?

THE WITNESS: That's correct.

MR. GREENE: Then at 2:45 p.m., you began a discussion of the case we're here about today.

THE WITNESS: That's correct.

MR. GREENE: All right. And then, of course, a written statement was taken in both matters.

THE WITNESS: That's correct.

MR. GREENE: Now what is marked as State's Exhibit No. 11, this is the information or statement that was taken pursuant to the other robbery in your county pursuant to State's Exhibit No. 10, the 1:35 p.m. waiver; is that correct?

THE WITNESS: That's right.

MR. GREENE: Of course, these are pieces of evidence that have been brought over from Randolph County.

THE WITNESS: That's correct.

MR. GREENE: By the clerk.

MR. MORRIS: You're not offering these?

MR. GREENE: Only for the record to clarify the record as to what the situation is.

THE COURT: Each time you investigate a different event, you again advised him of his rights; is that basically correct?

THE WITNESS: That's correct. Because different crimes, different jurisdictions, we felt that that should be on separate confessions and kept separate for the courts.

THE COURT: I think it's a true statement though that prior to this advice of rights, you had previously advised him of his rights; is that correct?

THE WITNESS: That's correct.

THE COURT: All right.

MR. MORRIS: I do renew my objection for the record. I object to the whole thing, starting with Monday.

THE COURT: Your objection is noted.
(Whereupon the following proceedings resumed in the presence and hearing of the jury:)

Q (By Mr. Greene, Continuing:) Now, sir, showing you State's Exhibit No. 72, sir, I ask you if that is the Rights Waiver you previously referred to , sir?

A It is.

Q And did you, on that occasion, sir, put the handwriting on that form?

A I put my name on that form, yes, sir.

Q All right. What is State's Exhibit No. 72?

A That's a standard Rights Waiver used by our department, the Department of Public Safety. It advises the person of their constitutional rights that's spelled out by the courts of the United States. It has a waiver part at the bottom that you ask the person if they understand their rights and if they're willing to talk with you and give you a statement.

Q And this is the form you used on the occasion as previously testified?

A That's correct.

Q And now you have, of course, signed it yourself, it bears your name and witnessed by Corporal W. C. Gibson.

A Yes.

Q Did you witness him sign it?

A Yes.

Q And also signed "Victor Stephens" and dated January 28, 1986. Did you witness that signature?

A I did.

Q And who signed that, sir?

A The Defendant, Victor Stephens.

Q Did he also put the date on there, sir, or someone else put it on there, do you recall?

A I don't recall who put it on there.

Q At the top it has, name, address, education, place, date and time. Do you know who put that on there?

A I believe that Chuck Gibson or Larry Yates put that there, either one.

Q It was there on the form when you used it?

A Yes, sir.

Q Were those things observed in your presence?

A Yes.

Q All right. Now, is this document, sir, in the same or substantially the same condition as it was when it was completed and signed and dated by you on that occasion?

A It is.

Q All right.

MR. GREENE: We move the introduction of State's Exhibit No. 72.

THE COURT: It will be admitted.
(Whereupon State's Exhibit No. 72 was offered and received in evidence.)

Q (Continuing:) Now, previously, sir, you indicated that this interview was begun at 1:35; is that correct?

A That's correct.

Q And did you also go over the Defendant's rights with him at 1:35?

A I did.

Q And do you have, sir, a copy of that — excuse me. I show you State's Exhibit No. 10, sir, and ask you if that's the Rights Waiver you went over with the Defendant at that time?

A It is.

Q All right. And at that time, sir, did you execute that Rights Waiver at that point in time?

A I did.

Q And did the Defendant execute it also?

A Yes, sir; he did.

Q Were there any offers or promises or hopes of reward or threats or coercion or intimidations offered to the Defendant at all in order to get him to sign this Rights Waiver?

A No, sir.

Q Is this document in the same or substantially the same condition now that it was at the time it was completed at 1:35 p.m., on January 28, 1986?

A It is.

Q All right.

MR. GREENE: We move the introduction of State's Exhibit No. 10.

THE COURT: Be admitted.
(Whereupon State's Exhibit No. 10 was offered and received in evidence.)

Q (Continuing:) Now, sir, on this occasion at 2:35, was in fact, there an interview with the Defendant, Victor Stephens?

A Yes, sir; there was.

Q I show you State's Exhibit No. 73, consisting of four pages, and I ask you if you would, to examine that exhibit, please, sir. Can you tell us what that is, sir?

A Yes, sir. It's the original copy of the statement taken from Victor Stephens on the 28th.

Q All right. And now I said four pages, I'll correct that to three pages.

A Yes, sir.

Q Now ABI Investigator Yates, was he present also?

A Yes.

Q Could you tell the jury, please, sir, how this interview was conducted and how this written document, Exhibit No. 73, was prepared.

A Victor Stephens was asked questions and he was asked to tell us what happened on the Hale County robbery and he relayed to us what happened and Larry Yates, investigator with us, was taking these notes down as he was telling us. After this was reduced down to writing, it was gone over with Victor Stephens and he signed it as being correct.

Q All right. Now after it was completed by Officer Yates, you and Gibson discussed it and did you go back over it with him?

A Yes.

Q Did you make any corrections or additions or initial it in any way?

A Yes, sir. Corrections were marked out and Victor Stephens put his initials there to show that the corrections were made in his presence.

Q All right. And he signed it and agreed that that was his statement about what happened on that occasion?

A Yes, sir; that's right.

Q All right. Is this document, sir, State's Exhibit No. 73, now in the same or substantially the same condition as it was at the time it was completed on that occasion by Mr. Stephens and yourself and Mr. Gibson and Mr. Yates?

A It is.

Q All right.

MR. GREENE: We move the introduction of State's Exhibit No. 73, and ask permission for the witness to read the statement to the jury beginning with the narration, leaving out that portion having to do with the introduction — if that's permissible, Mr. Morris. Would you like to see that?

Q (Continuing:) If you would, sir, read the statement to the jury, beginning with the paragraph that begins with a narration of events leaving out the introductory matters, please.

A "We went to New Orleans on Saturday night or early Sunday morning the 18th or 19th. This is the first time I

had been to La. with Peabody (Starks). We left La. early Monday morning 1/19/86. We came up the Interstate and turned off the Interstate after we crossed into Alabama.

After we came across a long bridge in Alabama, Peabody kept saying, 'he needed some money.' After we crossed the bridge, we pulled over to this store to get gas. Peabody said 'he needed some money.' I told him I had enough money to get us home.

When we pulled up to the gas pumps a white man came out and pumped us $10 worth of gas. I asked the man if he had a bathroom and he said 'no.' I got back in the truck and smoked a cigarette. Peabody went into the store. He stayed he the store a long time and I walked up to the store and opened the door, then this white man shot me in the hand. I fell to my knees and pulled my gun (.25 cal. automatic) out of my right rear pocket and started shoting. I don't even know if I shot anybody or not. The white man was standing to my left when he shot me with the shotgun. Peabody came running by me yelling 'let's go, let's go.' We ran out and jumped in the truck I didn't make it in time.

Going down the road Peabody asked me where my gun was. I told him, 'I left it at the store.' He said you really fucked us up this time.' I kept telling Peabody I was hurt, take me to the hospital and he wouldn't do it. He gave some gin and some rags to wrap my hand and then I laid down and went to sleep.

After we got back to Georgia, Peabody took me by Charlie Dallas's house. Dallas took me to the hospital in Bowdon, GA.

At the hospital I told my mother to get my coat and she did. She also got some money, about $30 or $40 out of my coat pocket."

Signed, "Victor Stephens."

Q All right. That was in fact the statement that was written and y'all did complete that on that occasion with this Defendant?

A That's correct.

Letter to Chief Judge Dewey Smith, Coweta Judicial Circuit,
July 25, 1989.
D–178

[Letterhead]

Hon. Dewey Smith, Chief Judge
Coweta Judicial Circuit
P.O. Box 623
Carrollton, Georgia 30117

RE: *State of Alabama v. Victor Remar Stephens (murder case)*
State of Alabama v. Christopher Starks (murder case)

Dear Judge Smith:

As you were previously made aware, sentencing hearings were scheduled in the above causes for yesterday, Monday, July 24th. These hearings were held, and since you are away from your office in conference, Judge Thigpen asked that I take this means to let you know his sentencings in each case.

In the case of Victor Remar Stephens, Judge Thigpen sentenced him to death.

In the case of Christopher Starks, Judge Thigpen sentenced him to life without parole.

If you wish to discuss the above causes with Judge Thigpen further, do not hesitate to contact me, and I will have Judge Thigpen get in touch with you as soon as possible.

Very truly yours,

Dottie Greer,
Secretary to Hon. Charles A. Thigpen

/dbg
cc: Circuit Clerk, Hale County, Alabama

Circuit Court of Hale County, Alabama

Defense Counsel's Opening Remarks

Stephens Trial, Penalty Phase

Record 908–912

PENALTY PHASE

DATE: July 24, 1989

BEFORE: HON. CHARLES A THIGPEN, Circuit Judge

(Whereupon State's Exhibits Nos. 1, 2 and 3 were marked for identification by the reporter.)

THE COURT: State ready?

MR. SULLIVAN: State's ready.

THE COURT: Defense ready?

MR. MORRIS: Defense ready, Your Honor.

THE COURT: You may open.

MR. SULLIVAN: Your Honor, we're here today on the sentencing of Victor Remar Stephens. As the Court knows from your experience of trying this capital case, this office has never asked you at any time to override a jury verdict. Today, we're doing that for the first time. When I was looking through the aggravating and mitigating circumstances out of consideration for the Court, the statutory mitigating and aggravating circumstances, I was able to look particularly at the mitigating circumstances and was able to make a

determination that there's not one mitigating circumstance that fits Mr. Stephens in this case. As the Court is aware, there are seven statutory mitigating circumstances. The history of violence of Mr. Stephens is probably unparalleled in this area. We'll introduce for the Court's consideration, five additional felonies showing that in 1981 Mr. Stephens was convicted of four burglaries and one theft by receiving stolen property all in Carroll County, Georgia. We have exemplified copies here and we would introduce them. We would like the Court to consider that in our recommendation in effect to override the recommendation of life without parole and sentence Mr. Stephens to death.

MR. MORRIS: Your Honor, I'll be brief. During the course of striking of this jury, there were a number of venire members, jury members that answered that they either knew or had contact or knew of each of the deceased. I believe the record would reflect of those at least two to three people sat on the jury itself. None of the venire acknowledged knowing anything of Mr. Stephens personally. This case was tried, both aspects of this trial was tried. None of the aspects that Mr. Sullivan brought to the Court's attention were kept from the jury's consideration when they recommended that he be sentenced to life without parole. The mere fact, I'm saying this to the Court, is that I think it would

be certainly an unprecedented act for the Court to invoke its own judgment when a jury had every bit of the information available, coupled with the personal knowledge of the deceased. None of which was available to the Defendant in this case.

We just merely ask this Court to follow the dictates of the people of Hale County, a cross–section that included black and white and their wishes and their recommendations to this Court that Mr. Stephens' life be spared and that he be sentenced to life without parole. We think the jury made that determination on all of the circumstances and recommended that to the Court and we would ask the Court to merely follow the recommendation of the jury of not only the deceaseds, but a jury of the peers of the Defendant.

MR. SULLIVAN: Your Honor, at this time, we would like to offer for the Court's consideration, five prior felony convictions of Victor Remar Stephens. First, is State's Exhibit No. 1, and it reflects a three–count indictment including the sentencing order that reflects three burglary convictions showing in effect that he was represented by counsel, being a Charles A. Lumpkin, Jr., Carroll County, Georgia, and was sentenced to a period of eight years to run concurrent with each other, Counts I, II and III. Now this was on January 16, 1981.

I would like to offer those for the Court's consideration.

I would like to offer State's Exhibit No. 2, showing that Mr. Stephens entered a plea to burglary. He was also sentenced pursuant to that and he was represented by Charles A. Lumpkin, Jr., and he was sentenced to a period of six years in the state penitentiary in the State of Georgia.

I would like to offer State's Exhibit No. 2. I would also like to offer State's Exhibit No. 3, showing Victor Remar Stephens was convicted of the offense of theft of stolen property and that was also in 1981 and sentenced to a period of six years in the state penitentiary. He was again represented by counsel, being Charles Lumpkin, Jr. This was in Carroll County, Georgia, and he was sentenced to a period of six years in the state penitentiary. He was again represented by counsel, being Charles Lumpkin, Jr. This was in Carroll County, Georgia, and he was sentenced to a period of six years in the state penitentiary. I would like to offer those for the Court's consideration at this time.

MR. MORRIS: We object to those. The introduction of those documents, Your Honor, we object to.

THE COURT: Grounds.

MR. MORRIS: Judge, that those — that those documents were available in the prior trial to the jury as well as to the Court.

THE COURT: I believe it was admitted.

MR. MORRIS: It was admitted at that time. It was not denied.

THE COURT: I'll overrule. Be admitted.

MR. SULLIVAN: State has no further evidence at this stage, Your Honor.

THE COURT: Further from the Defense?

MR. MORRIS: No, sir; Your Honor.

Supreme Court of Alabama
Petition for Writ of Certiorari and Brief of Appellant
Stephens Appeal

STATE OF ALABAMA JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

* * * * * * * * * *

VICTOR R. STEPHENS,

Appellant,

vs. SC Case No.

THE STATE OF ALABAMA,

Appellee.

On Appeal from the Circuit Court of
Hale County, Alabama
Hon. Charles A. Thigpen, Judge

PETITION FOR WRIT OF CERTIORARI AND BRIEF OF APPELLANT, VICTOR R. STEPHENS

OF COUNSEL:

BLANCHARD L. MCLEOD, JR.
Attorney at Law
P.O. Box 656
Selma, AL 36702–2656
(205) 875–2282

J. PATRICK CHESHIRE
Attorney at Law
P.O. Box 2365
Selma, AL 36702–2365
(205) 872–6440

IN THE SUPREME COURT OF ALABAMA

VICTOR R. STEPHENS, Appellant,	*	APPEALED FROM THE CIRCUIT COURT OF HALE COUNTY, ALABAMA
vs.	*	
STATE OF ALABAMA, Appellee.	*	SC Case No. _____

PETITION FOR WRIT OF CERTIORARI

Comes now the Appellant, Victor R. Stephens, by and through his attorneys of record, Blanchard L. McLeod, Jr., and J. Patrick Cheshire, and petitions this Honorable Court for a Writ of Certiorari to issue to the Court of Criminal Appeals in the above styled cause under Rule 39 of the Alabama Rules of Appellate Procedure, and in support thereof, assigns the following, separately and severally, to–wit:

(1) Petitioner was convicted of the charge of capital murder in the Circuit Court of Hale County, Alabama on December 17, 1987, and sentenced on July 24, 1989. The Alabama Court of Criminal Appeals affirmed the judgment of the trial court with opinion on August 3, 1990. An Application for rehearing was filed on August 17, 1990, and was overruled without opinion on September 21, 1990.

(2) With the application for rehearing, the Petitioner presented additional and corrected statements of fact pursuant to Rule 39 (k), ARAP, and requested the Alabama Court of Criminal Appeals to add or correct said facts in its opinion on re–hearing, which it failed to do. A copy of said additional and

corrected statement of facts are attached hereto and marked Exhibit "A", and incorporated herein by reference as if set out verbatim.

(3) The Alabama Court of Criminal Appeals case number is 2 Div. 738.

(4) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the prosecution performed misconduct under the principles set forth in *Ex parte Branch*, 526 So.2d 609 (Ala. 1987) and *Batson v. Kentucky*, 476 u.s. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986), where the prosecution used 21 of its 22 peremptory strikes (95.45%) to strike blacks from the jury venire.

Batson at page 1717 states, "[t]he Equal Protection Clause (Amend. 14 U.S. Const.) guarantees the defendant that the state will not exclude members of his race from the jury venire on account of race." Sections 1, 6 and 22, *Ala. Const.* 1901, combine to guarantee Equal Protection of the law.

Recently, the Alabama Supreme Court issued the opinion of *Ex parte Mary Williams*, S.Ct. Case No. 89–597, released June 22, 1990. In the *Williams* case, the Alabama Supreme Court stated on page nine:

> "With the prima facie case established, there is a presumption that the peremptory challenges were used to discriminate against black jurors, *Branch*, at 623; *the State then has the burden of articulating a clear, specific, and legitimate reason for the challenge that relates to the particular case to be tried and that is nondiscriminatory.*" (emphasis added).

It is more than obvious in the opinion of the Alabama Court of Criminal Appeals that the court sought any and every means possible and totally disregarded the *Batson*, *Branch*, and *Williams* guidelines to effectively deny your appellant Equal Protection under the United States Constitution and the Alabama Constitution.

Your appellant would specifically cite the opinion of the Alabama Court of Criminal Appeals on pages eight and nine wherein the court states as the total basis for the logic in disqualifying the following jurors:

> "8. Ms. Spence—sons had been involved in 'some very serious criminal offenses.'
>
> 9. Ms. Johnson—had been a defendant in small claims court and been served with numerous civil suits; appeared to be extremely responsive to the defendant's questions; also, the fact that she was chewing gum was felt to indicate her lack of respect for the seriousness of the proceedings.
>
> 11. Mr. Pratcher—although his permanent legal residence was in Hale County, he was currently living and working in Atlanta, Georgia; seemed to be interested in not serving on a jury; also was wearing sunglasses in the courtroom; also, at some time during voir dire proceedings, sat next to or appeared to have some sort of relationship with a juror excused for cause because of his views against capital punishment.
>
> 13. Ms. Shelton—prosecution found it 'extremely strange' that every juror from her small community except her had heard something about the crime since it occurred in that community; also very insistent about giving her marital status as separated.
>
> 15. Ms. B. Wilson—county sheriff was acquainted with juror and recommended that she

be struck because she was 'extremely anti-establishment' and because of belief that her husband had been involved in some type of criminal activity.

16. Ms. A. Harris—young, single, and unemployed; knew nothing of the facts surrounding the case.

17. Mr. K. Williams—general appearance was very rough and unkempt; also, like Juror Pratcher, appeared to be involved with a juror struck for cause because of his views against capital punishment.

18. Ms. Brown—husband a homicide victim; however, sheriff's department was concerned about her as a juror because of her belief that her husband's case had been mishandled.

19. Ms. Hayes—seemed totally removed from the situation; felt that this might indicate animosity on her part, since she worked at the nursing home where the wife of one of the victims now lived.

21. Ms. S. Harris—relatives had been in trouble with the law."

None of these strikes outlined above can in *any* way have "...clear, specific and legitimate reasons for the challenge that relates to the particular case to be tried and that is nondiscriminatory." *Branch*, at 623 as cited in *Williams* at page nine. Further, the Alabama Court of Criminal Appeals *totally* disregarded its own *Avery*, *Madison* decisions as well as *Branch* and *Batson* when it failed to even address the following point raised by your appellant.

The justification for the State's strikes ranges from ridiculous (chewing gum, (R–390, 391), to the sublime (wearing sunglasses, R–391). However, in *all* instances where the State

indicated that it might have some information that was gained by investigation prior to voir dire, the State *never* tried to investigate this information in any manner during voir dire. As the court stated in *Avery v. State*, 545 So.2d 123 (Ala.Cr.App. 1988), "[t]he prosecutor could have resolved her suspicions on voir dire, but she did not do so," at page 127.

"A prosecutor's failure to engage black prospective jurors, 'in more than desultory voir dire, or indeed to ask them any questions at all, before striking them peremptorily, is one factor supporting an inference that the challenge is based on groups bias.' " *People v. Turner*, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986). Cited in *Avery*, supra, at page 127. As the court affirmed in *Madison v. State*, 545 So.2d 94 (Ala.Cr.App. 1987) at page 99, "[a]s noted in *Ex parte Branch*, 526 So.2d 609 (Ala. 1987), the absence of voir dire questions directed to the challenged jurors must be weighed against the prosecution." The prosecutor, in this instant case, had the right of almost unlimited voir dire (within reason) to either confirm or deny his suspicions. But, he *never* chose to do so. Therefore, one *must* assume the systematic group exclusion of blacks. The very thing *Batson* sought to protect.

Additionally, the State justifies its strikes with reference to chewing gum, (R–390, 391), and wearing sunglasses, (R–391), upon its intuition. "Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination." *Branch*, supra, at page 623 citing *Batson*, supra, at page 1723.

(5) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the trial court abused its discretion in denying defendant's Motion for Mistrial based upon prosecutor's comment during closing arguments that the attorney for the defendant was attempting to hide evidence

form the jury since such statement was ineradicably prejudicial and imparted to the jury the impression that the defense counsel was engaged in an illegal activity in denying the jury access to all evidence in the case.

While it may be within the realm of fair comment for the prosecutor to attempt to address points raised by the defendant's counsel in closing argument, to allow a personal attack upon the veracity of counsel for the defendant is extremely prejudicial in that it focuses the attention of the jury away from the facts in dispute onto the personality and reputation of counsel.

(6) The basis of this Petition for Writ of Certioari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the State prosecutor committed reversible error when he tried to impeach the defendant for an offense for which he was not convicted.

The Court of Criminal Appeals used the Harmless Error Rule in upholding this reversible error. But, how can the error be harmless when the defendant testified for the mitigating circumstance of remorse and repentance of his previous life of crime. Although it may be proper for the prosecution to cross examine the defendant regarding prior criminal convictions, it is extremely prejudicial to the appellant's argument for the prosecution to address possible criminal activity that has never been proven and of which the appellant has never been arrested.

(7) The basis of this Petition for Writ of Certioari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not there was insufficient evidence adduced at trial to sustain a conviction as well as a failure of the State to carry the burden of proof with regard to the offense of capital murder: therefore, it was reversible error for the trial court to deny the defense motion for a directed verdict of acquittal at the conclusion of the State's case, as well

the defense motion for a judgment of acquittal at the conclusion of the trial.

The decision of the Court of Criminal Appeals hinges only on the allowabililty of circumstantial evidence. The court totally fails to acknowledge the dying declaration of the only eyewitness to the offense. The court does cover in its statement of the facts when it states on page seven:

> "The only evidence presented by the defense was in the form of testimony from Jessie Portis. Mr. Portis testified that he arrived at Bailey's store after Mr. Bailey and Mr. Pickens were shot. He leaned down and asked Mr. Pickens if he could say what color vehicle the robbers were in. According to Mr. Portis, Mr. Pickens responded that the robbers were in a red vehicle. When asked if the robbers were white or black, Mr. Pickens stated, 'white.'"

(8) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the death penalty imposed by the trial court judge in this cause should be reversed.

There is absolutely no justification stated in the August 3, 1990 decision of the Alabama Court of Criminal Appeals which would provide any facts to the trial court that were not known to the trial jury that would justify the reversal by the trial jury when it imposed life without parole in this case.

(9) The basis of this Petition for Writ of Certiorari is that the decision of the Alabama Court of Criminal Appeals failed to adequately address the issue of whether or not death by electrocution as applied by the State of Alabama constitutes

cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the Untied States of America and Article 1, Section 15 of the Constitution of the State of Alabama.

In light of recent developments concerning the reconditioning of the Alabama electric chair as a result of the necessity of using repeated shocks to bring about the death of the condemned individual which has been widely reported in the press, the court should take judicial knowledge thereof.

(10) In light of the recent study of the United States General Accounting Office, the Alabama Supreme Court should consider the issue of whether or not the application of the death penalty is discriminatory in nature, and, therefore, violative of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution of America and the appropriate provisions of the Alabama Constitution (1901). A copy of this United States General Accounting Office report is annexed and marked as Exhibit "B" to this Petition for Writ of Certiorari. Because of this recently discovered evidence, your Petitioner is presenting this issue in this Petition for Writ of Certioari and will file a supplemental brief with reference to this issue.

WHEREFORE, your Petitioner respectfully requests that after preliminary examination, this Writ of Certiorari be granted and that this Honorable Court proceed under its rules to review this matter complained of, and to reverse the judgment of the Alabama Court of Criminal Appeals, and for such other relief as your Petitioner may be entitled.

Submitted in support thereof is the Brief with Argument of your Petitioner.

Respectfully submitted,

Blanchard L. McLeod
Of Counsel for Appellant

Exhibit "A"

STATEMENT OF THE FACTS

On or about January 20, 1986, a robbery took place in Hale County, Alabama at Bailey's Grocery Store located on Highway 14, (R–167). During this robbery two men, Mr. James R. Bailey, age 72 and Mr. Adam Pickens, age 82, were killed, (R–166).

On January 21, 1986, Charles S. Stone of the Georgia Bureau of Investigation, Dennis Holloway of the Carroll County, Georgia Sheriff's Department, Chief Deputy A. S. Manley of the Randolph County, Alabama, Sheriff's Department and A.B.I. Agent Ed Trayler interviewed Mr. Victor Ramar Stephens at the Carroll County Hospital, in Carroll County, Georgia, where he was being treated for a gunshot wound to his left hand, (R–39). During the course of this interview, Mr. Stephens stated to these representatives of law enforcement from the States of Georgia and Alabama that he had been shot the previous day at approximately 6:00 p.m. by an individual named Dennis Johns. At that time, the interview was terminated, (R–39, 40). Mr. Stephens was taken into custody for suspicion of involvement in two robberies, one occurring in Carroll County, Georgia, and the other occurring in Randolph County, Alabama, (R–59). Subsequent interviews with Mr. Stephens were held at the request of Mr. Stone and Mr. Trayler at the Carroll County Jail on the days of January 23rd and January 25, 1986, (R–27). During the course of the interview that took place on January 23, 1986, Mr. Stone stated that he did not recall whether or not Mr. Stephens had requested Mr. Stone to aid him in getting some relief for the pain he was feeling in his injured hand in exchange for a statement concerning the offenses with which he was charged, (R–41).

As a result of the statements acquired from Mr. Stephens by Officer Stone and Trayler, Mr. Stephens was extradicted to Hale County, Alabama and was subsequently indicted for the capital murders of Mr. James R. Bailey and Mr. Adam Pickens.

The following is the transcription of the *Batson* motion, argument of counsel and the justification to the Court for the strikes of the black venire persons:

> "Mr. Morris: Judge, I would offer to the Court, a brief, or would bring to the Court's attention, a motion previously filed. The Court is aware of *Batson* Motion, and *making it known to the Court that the basis of the Batson Motion is that of the 22 jurors struck, which is not including the alternate, the first 21 were black. The other juror that was struck by the State was juror number 22, which was their last strike and they struck number 106, which was Mr. Wyatt.* (emphasis added). We feel like under the language, that it's clear that through the process of jury striking, that they have systematically excluded members of the black race. Further, for the record, my client (R–386) is black and we feel like that is a violation of the *Batson* case.
>
> THE COURT: What is the composition of the venire total?
>
> MR. GREENE: As I understand it, it's seven white, five black.
>
> THE COURT: The jury as struck is seven white and five black.
>
> MR. GREENE: I think so.

THE COURT: What is the composition of the venire as a whole?

MR. GREENE: We've got it right here. Mr. Corley, number 17 is a white male. Mrs. Ferguson is a white female. Ms. Fondren, number 29, is a white female. Mr. Brenstead, is a white male, Lyles is a black female, Marks is a black female, 82 is a black male, 92, Travis, is a black female, 94, Tucker, is a white female, and 96 is Beth Williams, and that's a white female, and 101 is Willie Williams, a black female, and the alternates are Michael G. Harris, number 38, a white male, and Mr. Tubbs, number 93, white male.

THE COURT: Who's the last juror struck?

MR. GREENE: Number 106, Mr. Wyatt.

THE COURT: Last juror? The last juror, number 38, (R–387) that was the last person struck, period, was number 38, Michael G. Harris, by the State; is that correct?

MR. MORRIS: That's true, as an alternate.

THE COURT: All right. The composition of this jury is seven and five. Now depending on the alternates, it could be eight and four.

MR. GREENE: Eight and five if you keep the alternate.

THE COURT: All right. *You've made a prima facie showing, justify your strikes.* (emphasis added).

MR. GREENE: First of all, we did not attempt to strike jurors solely because of their race. We did, however, strike jurors for reasons I would like to state in

the record at this time. I'll try to take them in order and state those reasons as best I can.

We struck juror number 68, Mr. Mickens, his position on capital punishment, which, I think is already of record.

We struck juror number 4, Mrs. Ball, on her position on capital punishment.

We struck juror number 5, who's also a Ball, as I understand it. Mr. Ball, the information was that he had answered affirmatively on drugs, that is, that he, or some member of his family or (R–388) some personal friend being so involved. The information also received was that he was some sort of part–time preacher and that his son had been in some serious trouble dealing with drugs and/or criminal activity. That was from law enforcement investigation. Finally, he indicated he did not want to serve and would ask to be let off, as we understood it. Now number 76 was our next strike, and that was Mr. Patton, who had answered affirmatively on our question concerning previous knowledge or association of any type of criminal offense. Our office had prosecuted him for night hunting. We seized his weapons and sold them and he had also been convicted of a DUI on other occasions.

Number 47 was a Margaret Hood, and we struck her because she asked off and had quite a bit to say about lack of transportation and inability to get here and she was concerned and wouldn't be able to pay attention, etc. Finally, it seems as if she and her husband have a history or problem in the child support court. Her husband actually being prosecuted and even done some time in the jail with reference to that. Of course, our office handles the child support program. Now that was in

Perry County, there was (R–389) some type of connection, a cousin or something. That's the reason we're so familiar with them.

Number 46 was a Mattie Hollifield. We struck her because she had been arrested and charged with worthless checks and similar type offenses on several different occasions.

We struck juror number 36, which was Carolyn Harris. The information gathered during voir dire was that she was young, single and unemployed and our information in our investigation prior to that was that her brother is a defendant or has been a defendant in a criminal case which is being prosecuted.

We struck juror number 87, Vinie P. Spence. The information was that her sons had been in some very serious criminal offenses. We just felt like she would not be a good State's juror in this case.

We struck juror number 49, Dorothy Johnson. Information from investigation was that she had been a defendant in small claims court and been served with numerous civil suits. She was not particularly well thought of and recommended to us as a juror to strike. In voir dire, she seemed to be extremely responsive to the Defendant's questions. I noticed that she was (R–390) chewing gum and not particularly concerned about this and felt like she would not be a proper juror to serve on this jury.

Number 18 was our 10th strike, Betty Cottrell. She asked off this jury. She did not want to serve and she answered our questions with reference to involvement and knowledge of criminal activity in the affirmative.

She indicated that she or someone very close to her had been charged with some criminal offense.

Our next strike was number 80, Willie Pratcher. This is the juror who indicated that he lived in Atlanta and seemed to be interested in not serving. He was wearing sunglasses and that to me has always been a point. When I find jurors doing that, unless there's a real good reason for it, generally, they do not tend to make very good State jurors. He's the only one in that position. He also was sitting next to a Mr. Gray. Defense counsel brought to the Court's attention, of course, our attention at the same time, that Mr. Gray, a juror struck for his feelings on capital punishment, had approached defense counsel discussing or talking or making some comments about burning the guy or something of that nature and Mr. Pratcher seemed to have (R–391) some type of relationship with him. I felt uncomfortable leaving him on the jury knowing the propensity of the Juror Gray to verbalize his position.

Number 59 was struck as our 12th strike. That's Miss Gracie M. Lewis. Our information is that she was single and unemployed. Also, our investigative information indicated that her son had been involved in a death or a killing. Information was not clear as to whether it was some type of automobile accident or whether it was some criminal charge, but in any event, her son was involved in it in some manner and we felt like she could not stay on as a juror.

Our 13th strike was number 85, Willie Shelton. I think it's Shelton. This juror, in the course of individual voir dire, is from community and, of course, was listed here, her marital status here, as separated. She was very insistent on that. She reported that she lives in this particular community and never heard anything about

this case whatsoever. We find that extremely strange and based on that, felt like she should not remain as a juror in this case.

Number 97, Essie Lee Williams, on individual (R–392) voir dire, she seemed to be familiar with the case which, being from the general area of this offense, that would seem to be a plus, but her individual voir dire, she seemed to be very concerned and communicated to us that she was well aware of the fact that one of the men had lived to tell all about it and she was waiting very much to hear that. Seemed to be very concerned about that. Of course, we're very familiar with the evidence in this case where there is a proposed dying declaration from the deceased, "Pop", indicating some words to the effect that some two white men did it. We felt that leaving her on the jury with anticipation of testimony would certainly be detrimental to us.

Our 15th strike was 102, Bertha L. Wilson. Sheriff's Office recommended this juror be struck. The Sheriff himself indicated he had known her for quite a long time and felt that she was extremely anti–establishment. That her mother was considered by him to be a person he thought well of, but he was concerned with Mrs. Wilson. He believed that her husband had been previously in some type criminal trouble. We felt that during the voir dire, she seemed to (R–393) be very unconcerned about this very serious matter that she was about. We struck her on that basis.

Our 16th strike was number 35, Annie Harris. She had reported from her information as being single, unemployed and relatively young. The note I made was that she knew nothing about the case.

Our 17th strike was number 98, and that was Kenneth L. Williams. Observations by our group in observing the jurors was that this man was once again, seemed to be involved with the juror, Mr. Gray. He seemed to be associating with him. His general appearance was very rough and simply felt like the combination of the two justified and required us to remove him from the jury panel.

Our 18th strike was number 9, Ruby Lee Brown. Now she, according to our information, had had a husband who had been killed in a homicide. That seemed to be a plus. Sheriff's Office was very concerned that she was extremely negative about that particular case and we felt that leaving her as a juror would not be wise under these circumstances. She was not happy or pleased with the situation, that we should remove (R–394) her, so we did.

Juror number 40, Mrs. Hayes, Lelia Hayes, getting to the point where some of these jurors had some pluses. We were concerned about keeping her. Mrs. Hayes worked with Mrs. Bailey at the nursing home. However, the reaction during individual voir dire concerning that, she seemed to be totally removed from that situation and totally unconcerned about it and based on that, we felt there might be some animosity or something we didn't realize with Mrs. Hayes. We struck her on that basis.

Number 43, Mrs. Hobson, was our next strike and this was a juror we had decided that we would leave on the jury or keep on the jury, but we felt that she was all right, from our standpoint. However, our information was that she was requesting to get off the jury and had requested to get off the jury. She had had an invalid husband and the storm last night essentially damaged

their house. So we went ahead and removed her for those reasons. Otherwise, we would have kept her.

Our 21st strike was number 59 — 39, Sarah Harris. The information reported was that she had kinspeople who had been in criminal trouble and though (R–395)we had otherwise felt that she was all right, that information caused us to remove her.

Juror number 106 was Mr. Wyatt, who had indicated he had been in criminal trouble and had been prosecuted at some point in time, though he was extremely positive in his individual voir dire, that information, we felt, required that he be removed.

MR. JOHNSON: He was a white male.

MR. GREENE: And juror number 38, was Mr. Michael Harris, who indicated that he had a cousin at some point in time, 15 years ago, that had been involved in some type of criminal activity and we struck him on that basis.

THE COURT: Is that all?

MR. GREENE: That concludes all our strikes. We would like to mention for the record that the defense strikes were of all white males or females, for whatever benefit that is.

THE COURT: Cross examination.

MR. MORRIS: Judge, I'm not sure that I have any cross. I would make it known for the record on I think there were three people that they mentioned and that was Mr. Williams, Mr. Pratcher and a Mr. Pratcher. Mr. Kenneth Williams and Mr. Willie Pratcher and one other individual (R–396) that I believe the District

Attorney eluded to as sitting near or being around Mr. Gray. I would make it known to the Court, I believe the Court would recall that during yesterday's continuous voir dire that lasted into the night, Mr. Gray was an occupant on the front row with a Mr. Corley sitting on one side and a Mr. Collins sitting on the other. Both of whom were white. To my knowledge, there was not another black individual on the front row yesterday. So I would differ with the information of the State in that regard.

Now the information that the District Attorney has concerning things like they had some relatives involved in some crimes, being in small claims court where they've beendidn't seem to know anything about it, we contend that the jurors by comparison that were left on this case knew nothing about it. Starting with Mr. Grinstead, Mrs. Fondren, Mr. Corey, also responded that they knew nothing about it. A Mrs. Lyles.responded that she knew something about it. She was left. A black female. Now Mrs. Marks responded that she knew (R–397) something about it, a black female. A Mr. Ryans responded that he knew something about it, a black male. A Mrs. Travis responded that she knew something about it, a black female. Mrs. Williams responded that she knew something about it, a black female, and our contention is that it's clear that the fact that someone knows nothing about it played no part and we contend that it was strictly on the basis of race in this matter.

As to Mrs. Ruby Lee Brown, she stated in voir dire that her husband was a victim of a homicide and that the victim was prosecuted and there would be no other — I

believe she also responded — I believe she had a bumper sticker — I take that back, Your Honor. That's not true. I'm saying that there would be no reason in the world that I can think of why she would not be an excellent juror other than race. She was struck.

Further, we contend that the last four strikes that they enumerated, starting with Mrs. Brown, are very vague and very indecisive answers. For instance, Mrs. Hayes, number 19 strike, number 40 on the venire list, stated that she knew Mrs. Bailey and that she knew her and knew her (R–398) daughter and had an association with Mrs. Bailey who's in the nursing home where she's employed as well as knew her daughter well. No conceivable reason that the defense can find, no conceivable reason that she would not make an excellent juror for the State, other than the fact that she's black.

Now there's vague allegations on number 43, they say that her husband had been in some sort of problem. Mrs. Hobson, we contend that's just a smoke screen there. And then one of the persons up here, he had some sunglasses on. The defense contends certainly that is no justifiable reason. Now that's all I have.

MR. GREENE: Our only response is that one of the first things as to Mr. Gray, it was reported to us and made quite some concern as to Mr. Gray this morning concerning who he might talk to. Now this is the information we got from the people we asked to try to pay attention. Now Mr. Williams, Gray, Patton and Pratcher, were sitting together this morning in the back of the courtroom. We felt that that might be a matter of concern. We point out for the record that the last, I think, five strikes, for the State involved two white males we thought we (R–399) had some problems with and three black females that we were concerned about. We

also thought these three black females might make us good jurors, but we had reason, we felt, overrode our desires to retain them.

I think that's all.

THE COURT: Is it your testimony as an officer of this Court that the reasons for striking were nonracial and not based upon the race of any particular juror?

MR. GREENE: It is, Your Honor. I think the jurors we have before us bears that out. There's black males serving, some five blacks in total. We have an abundance of females on this jury in a capital murder case. I think we've got a jury that well reflects, based upon peoples backgrounds, Your Honor, and on that basis, a fair racial mixture of males and females, black and white, in this community. We arrived at this through exhaustive and argumentative process.

At Mr. Stephens trial which began December 14, 1987, the Hon. Larry W. Morris, trial counsel for Mr. Stephens, raised an objection to the fact that of the 22 jurors struck by the State, the first 21 were black, (R–386).

During the closing arguments of the State, Mr. Ed Greene, Chief Deputy District Attorney, made an allegation to the jury that Mr. Morris was attempting to cover up all the evidence, a direct and personal attack on the character of a fellow–attorney, Mr. Morris, (R–814). Although Mr. Morris objected to this comment, the Court overruled his objection and allowed Mr. Greene to continue with his attack, (ibid).

During the penalty phase of Mr. Stephens' trial the court allowed the State of Alabama in the person of

Mr. Greene, to elicit testimony concerning a crime alleged to have been committed by Mr. Stephens in Carrollton, Georgia, although Mr. Stephens had never been convicted of the offense, (R–870, 871).

At the appellant's sentencing trial, the State's prosecutor specifically stated that there were only two aggravating circumstances that they intended for the jury to consider, (R–858). The first aggravating circumstance was the alleged event that was the basis of the trial. The second alleged aggravating circumstance had occurred 11 days before this alleged event, (R–865). The trial court specifically charged the jury that there were only two aggravating circumstances for them to consider, (R–883).

The trial jury deliberated the issue of whether life without parole or the death penalty was the appropriate penalty to impose in this case. After deliberation, the trial jury, by a seven (58%) to five (42%) vote, determined that life without parole was the appropriate sentence to be imposed in this case, (R–906). Yet, the trial court, without justifiable causes stated, refused to give any credence to any of the mitigating issues presented by the Defense counsel before the advisory jury and sentenced the appellant to death.

The appellant was convicted of capital murder on December 17, 1987, (R–183), and sentenced to death on July 24, 1989, (R–908, et seq.).

Supreme Court of Alabama
Application for Rehearing
Stephens Appeal

IN THE SUPREME COURT OF ALABAMA

No. 1900032

Ex parte Victor Stephens

In re:

VICTOR STEPHENS,	*	2 Div. 738
	*	
Appellant,	*	On Appeal from
vs.	*	Hale County Circuit Court
	*	CC–89–34
STATE OF ALABAMA	*	
	*	
Appellee,	*	

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

Blanchard L. McLeod, Jr.
622 Alabama Avenue
Selma, Alabama 36702

Counsel for Victor Stephens

IN THE SUPREME COURT OF ALABAMA

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	In re:	
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STATE OF ALABAMA	*	
	*	
Appellee,	*	

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

On March 15, 1991, this Court affirmed the conviction and death sentence of Victor Stephens. Mr. Stephens comes before this court pursuant to Rule 40 of the Alabama Rules of Appellate Procedure and seeks reconsideration of this Court's judgment denying relief from an unconstitutionally obtained conviction and death sentence in *Ex parte Stephens*, _____ So.2d _____, No. 1900032 (Ala. 1991).

Mr. Stephens contends that this Court has failed to properly recognize violations of his rights under state and federal law and incorrectly concluded that his conviction and death sentence are due to be affirmed. In support of his application for rehearing Mr. Stephens incorporates by reference his briefs filed on appeal to this Court and further submits the following.

ARGUMENT

I. THIS COURT ERRED IN CONCLUDING THAT THE PROSECUTOR'S USE OF 21 OUT OF 23 PEREMPTORY CHALLENGES AGAINST BLACK JURORS DID NOT VIOLATE *BATSON* AND ALABAMA LAW.

The prosecutor in this case used ninety–one percent (91%) of its available peremptory challenges to exclude black potential jurors from jury service at Mr. Stephens' capital trial. The exclusion of 21 black potential jurors out of 23 peremptory strikes establishes an extraordinary prima facie case of racially biased jury selection that could not be rebutted by the prosecutor's professed reasons. The prima facie evidence of racially discriminatory use of peremptory challenges was so great in this case that a prosecutor cannot simply state what would otherwise constitute racially neutral reasons and adequately rebut the showing of a constitutional violation.

This Court's deference to the reasons proffered by the prosecutor for exercising 91% of the State's peremptory challenges against black jurors violates *Batson v. Kentucky*, 476 U.S. 79 (Ala. 1987); *Ex parte Branch*, 526 So.2d 609 (Ala.

1987), and is wholly inadequate to combat invidious racial discrimination in the imposition of criminal justice.

II. THE TRIAL COURT'S STANDARDLESS AND IMPROPER OVERRIDE OF THE JURY'S VERDICT OF LIFE IMPRISONMENT WITHOUT PAROLE VIOLATES MR. STEPHENS' RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ALABAMA LAW.

The standardless and arbitrary override of jury verdicts for life imprisonment without parole in Alabama violates state and federal constitutional protections rooted in the Sixth, Eighth and Fourteenth Amendments. The trial court's override of the jury's verdict for life imprisonment without parole in this case was particularly unconstitutional where the trial judge offered no reason for rejecting the jury's verdict for life imprisonment without parole; the facts of this case did not dictate that a judgment of death was so clear and convincing that no reasonable person could differ, and neither the Court of Criminal Appeals nor this Court made any specific review of the propriety of the trial court's override in this case or otherwise sought to limit and regulate the use of override in Alabama capital proceedings.

Of the three states which permit judge override of a jury recommendation of life, only Alabama has articulated no precise standard to guide a trial judge's consideration and override of a jury verdict of life imprisonment without parole.[1] In rejecting

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1. *See Chavez v. Indiana*, 539 N.E.2d 4 (Inc. 1989) (Expressly noting that Alabama has not yet adopted a precise standard to regulate judge overrides of

the *Tedder* standard as an "extra protection" afforded capital defendants, *Murry v. State*, 455 So.2d 53, 65 (Ala.Crim.App. 1983), appellate courts in this state have failed to recognize that a mechanism limiting discretion is integral to the constitutionality of the override.[2] *See Dobbert v. Florida*, 432 U.S. 282, 285 (1977) (terming *Tedder* standard a "crucial protection" in the Florida scheme).

Under Alabama law, before a sentence of death can be imposed on a person convicted of a capital offense, the defendant has a right to a sentencing hearing before a jury that must carefully weigh aggravating and mitigating circumstances and render a sentencing verdict which is advisory. §13A–5–46, *Code of Alabama*, 1975. The jury plays a critical role in imposition of the death penalty in Alabama. Alabama law has required that any error undermining the reliability of the jury's critical sentencing determination must result in a new sentencing proceeding.

In upholding Florida's override provision in *Spaziano*, the United States Supreme Court expressly relied on Florida's standards which guide a trial court's decision to override a jury recommendation of life.[3] *See Tedder v. State*, 322 So.2d 908 (Fla. 1975). This Court has adopted no guidelines and as a

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jury sentencing verdicts in capital cases). *See Infra.*

2. Some Alabama judges and commentators have expressed a desire for Alabama to adopt a *Tedder* standard and provide guidance to judge override. *See e.g., Ex parte: Arthur Jones*, 456 So.2d 380, 382 (1984) (J. Jones concurring); Colquitt, "The Death Penalty Laws of Alabama" 33 Ala.L.Rev. 213, 326–328 (1982).

3. In Florida a trial court may override a jury recommendation of life only if "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." *Proffitt*, 428 U.S. 242, 249, *quoting Tedder v. State*, 322 So.2d 908 (Fla. 1975).

result jury verdicts for life are rejected arbitrarily and without adequate constraints. Some trial judges consider jury verdicts for life to be mitigating circumstances, some like Mr. Stephens' judge do not. This court has previously stated that additional appellate review takes place in override cases, *Ex parte Tarver*, _____ So.2d _____ (Ala. 1989), yet neither this Court nor the Court of Criminal Appeals specifically reviewed whether the judge's override was justified.

The arbitrary and standardless application of the death penalty after sentencing juries have carefully concluded that death is not the appropriate punishment should be reconsidered by this Court.

III. THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FELONY-MURDER IN VIOLATION OF STATE AND FEDERAL LAW.

At Victor Stephens' trial, the court only instructed the jury on intentional murder during the course of a robbery and on intentional murder. The trial court should also have instructed the jury on the lesser included offense of felony–murder. The State introduced overwhelming evidence of a robbery and substantial evidence that the killings were the unintended consequence of one of the victims drawing and firing a shotgun. In fact, the evidence of an unintentional killing was so strong that the court actually instructed the jury on the affirmative defense of self–defense. Given the evidence of robbery, the court's failure to instruct on felony–murder left the jury with only two options: either to convict the defendant of capital murder or to acquit the defendant. This deprived Mr. Stephens of his due process rights guaranteed under *Beck v. Alabama*, 447 U.S. 625 (1980), and applicable state law.

The law in Alabama is well settled that "the jury must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict." *Hopper v. Evans*, 456 U.S. 605, 610 (1982).

The cases following *Beck v. Alabama*, 447 U.S. 625 (1980), have made it clear that the standard to determine when a lesser included instruction should be given is whether "there is any reasonable theory from the evidence which would support the [lesser offense] position." *Fulghum v. State*, 277 So.2d 886, 890 (1973); *Cook v. State*, 431 So.2d 1322, 1324 (Ala. 1983) (*quoting Hopper v. Evans*, 456 U.S. at 611–612); *Richardson v. Johnson*, 864 F.2d 1536, 1538 n.3 (11th Cir. 1989).

Under the *Fulghum* standard, an accused is entitled to a lesser included instruction regardless of whether the State or the defendant offers the evidence supporting the lesser included offense. *Ex Parte Pruitt*, 457 So.2d 456, 457 (Ala. 1984). In addition, if "the defendant denies the charge but the evidence presented by the State suggests a reasonable theory supporting a charge on a lesser offense, the trial court is obliged to give a charge on the lesser offense when requested." *Id.*

In the case at bar, the State presented to the jury three statements of the defendant. In the first statement, given on January 23, 1986, Mr. Stephens stated that it was the co–defendant's idea to rob the store, that he did not know who had shot first, his co–defendant or the store–owner, but that when he entered the store "he was shot by one of the men in the store with a shotgun." R–619. He also related that he was high on cocaine and LSD prior to the robbery and therefore could not remember all of the details. R–619. In the second statement, which was given on January 25, 1986, and read to the jury, Mr. Stephens stated:

> I just walked into the store after Peabody [the co-defendant] went in. He had been in a while so I went in to see what was happening. When I walked in, the white man started shooting with a shotgun. I just pulled out my pistol and started shooting. We left and came back to Georgia.

R–626–27. And in the third statement, given on January 28, 1986, and also read to the jury, Mr. Stephens explained:

> After we came across a long bridge in Alabama, Peabody kept saying, 'he needed some money.' After we crossed the bridge, we pulled over to this store to get gas. Peabody said 'he needed some money.' I told him I had enough money to get us home.
>
> When we pulled up to the gas pump a white man came out and pumped us $10 worth of gas. I asked the man if he had a bathroom and he said 'no.' I got back in the truck and smoked a cigarette. Peabody went into the store. He stayed [in] the store a long time and I walked up to the store and opened the door, then this white man shot me in the hand. I fell to my knees and pulled my gun (.25 cal. automatic) out of my right rear pocket and started shoting. I don't even know if I shot anybody or not. The white man was standing to my left when he shot me with the shotgun. Peabody came running by me yelling 'let's go, let's go.' We ran out and jumped in the truck. I didn't make it in time.

R–669–670.

Clearly, this evidence supported a theory of felony–murder and the trial court recognized as much. The court notified the parties that it would instruct the jury on capital murder and on the lesser included offense of felony–murder. R–776–77; R–781. However, the court ultimately decided not to instruct on

felony–murder because the State convinced the court that there is no difference between intentional murder during a robbery and felony–murder. R–782 ("[t]hey don't have to come in with intent to kill them and rob them").[4] The court's failure to charge on felony–murder denied Mr. Stephens his right to due process and to be free from cruel and unusual punishment in violation of state and federal law.

IV. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON REASONABLE DOUBT IN VIOLATION OF VICTOR STEPHENS' RIGHT TO DUE PROCESS.

At Victor Stephens' trial, the court's instruction on reasonable doubt would have allowed the jury to find the defendant guilty on a degree of proof below that required by the Due Process Clause of the Alabama and United States Constitutions.

Most recently, the United States Supreme Court summarily reversed a conviction where the trial court had improperly instructed the jury on the element of reasonable doubt. *Cage v. Louisiana*, _____ U.S. _____, 59 U.S.L.W. 3361 (November 13, 1990). The instruction under review in *Cage* provided:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence

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4. The State's position, of course, is clearly erroneous. *See Russaw v. State*, 572 So.2d 1288 (Ala.Crim.App. 1990).

> demonstrated a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Id. The Supreme Court concluded that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by due process. The Court wrote:

> It is plain to us that the word "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it become clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id.

At Victor Stephens' trial, the court used the words that the Supreme Court held are commonly understood to denote a higher degree of doubt. The court stated that "the doubt which would justify an acquittal must be *an actual and substantial doubt*. . ." R–832 (emphasis added). The court told the jury that it need only have "an abiding conviction of the truth of the

charge." R–832. In addition, the court, at several points, equated beyond a reasonable doubt with "to a moral certainty." R–833. The result was that the jury should have found defendant guilty on a degree of proof below that required by due process.

V. THE STATE PROSECUTOR ENGAGED IN IMPROPER ARGUMENT IN VIOLATION OF MR. STEPHENS' STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

The prosecutor at Victor Stephens' trial made an improper reference to the substance of the co–defendant's statement, in direct violation *Bruton v. United States*, 391 U.S. 123 (1968), and also improperly shifted the burden of proof, in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979). In addition, the prosecutor repeatedly made impermissible references to the victim and the victim's family, in violation of *Booth v. Maryland*, 482 U.S. 496 (1987).[5]

A. *The Bruton Violation.*

During closing argument, the state prosecutor remarked:

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5. *See, e.g.*, R–788 ("on behalf of the State of Alabama and Mr. Pickens and Mr. Bailey and the relatives, we appreciate [your attention] very much"); R–819. The state also engaged in the impermissible practice of sitting the victim's family at the prosecutor's table. *See* R–417.

> Now in the course of this trial, there was some evidence about an eyewitness and there was a comment from the witness stand concerning the fact, that wait a minute, there's another eyewitness. You can only speculate as to what he had to say. You're not going to know anything about what he said or didn't say. Now this man's co–defendant is not saying, "Oh, yeah, it was mu idea, I'm the guilty one." You can bet your bottom dollar he's pointing the finger at him saying, "no, he lead us into it." So what is this statement? It is that, "I was there, I was involved with it," and he's covering up what he really did and that is that both of those men went in there to rob and do whatever was needed to get money from those two old men. . .

R–818–819.

The State's use of the co–defendant's statement denied Mr. Stephens the right of cross–examination secured by the Confrontation Clause of the Sixth Amendment. *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Gladden v. State*, 551 So.2d 1141 (Ala.Crim.App.), *cert. denied* (1989) (reversing on the basis of *Bruton*).[6] The highly prejudicial nature of the prosecutor's statement, namely that the co–defendant pointed the finger at Mr. Stephens, requires reversal in this case.[7]

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6. The interlocking confession exception carved out in *Parker v. Randloph*, 442 U.S. 62 (1979) does not apply here since the trial court gave no limiting instructions.

7. Earlier, the trial court specifically precluded the state prosecutor from questioning an investigative officer on the co–defendant's statement, exclaiming "I can't do that. I cannot do that. I can't let Starks' out–of–court statement — I just can't do that. I think that's rank hearsay in one respect." R–651.

b. *The Improper Burden Shifting Remarks, Comment on Silence and Penalization for Exercising the Right to Counsel.*

During closing argument, the prosecutor also remarked:

> He got up in his closing argument, and keeps trying to talk about holes somewhere. Yet he never proved a single piece of evidence about anything connecting with that. He's supposed to give you some idea, and you're supposed to believe that somewhere they had this man down in a hole beating on him with sticks to make him confess. That's what you're supposed to believe. But he hasn't proved anything like that. . . . He hasn't proved anything like that because it doesn't exist. . . . He hasn't proved any of it. I get awfully tired of coming up here listening to that kind of defense. Where is his defense in this case? What is he defending this man on?

R–814–815.[8]

These remarks improperly shifted the burden of proof in general, and, in particular, the burden of proving the involuntariness of a statement, in violation of Mr. Stephens right to due process. *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that an instruction concerning a presumption of intent violates due process); *Lowery v. State*, 108 So.2d 351 (Ala.Crim.App. 1926) (remark that "[h]e had his friends here, but he did not

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8. Counsel objected to this line of argument, claiming that it improperly shifted the burden of proof and penalized the defendant for asserting his right to counsel. R–815.

put them on the stand" held to be reversible error). The remark also amounted to an indirect comment on the defendant's failure to take the stand and testify, in violation of his Fifth Amendment privilege against self–incrimination. *Ex parte Williams*, 461 So.2d 852 (Ala. 1984); *Ex parte Brooks*, 562 So.2d 604 (Ala. 1990); *Arthur v. State*, Slip Op. at 44 (Ala.Crim.App. 1990). Finally, the state prosecutor penalized the defendant for exercising his right to counsel, in violation of Mr. Stephens' right to a fair trial.[9] *Cunningham v. Zant*, No. 90–8165 (11th Cir. 1991) (improper appeal to the passions and prejudice of the jury and derogation of defendant's right to fair trial highly improper); *United States v. McDonald* 620 F.2d 559 (5th Cir. 1980).

VI. THE TRIAL COURT IMPROPERLY RELIED ON A SUBSEQUENT CONVICTION TO OVERRIDE THE JURY'S VERDICT OF LIFE IN VIOLATION OF MR. STEPHEN'S STATE AND FEDERAL DUE PROCESS RIGHTS.

Mr. Stephens was convicted of first degree robbery and attempted murder on October 20, 1987, in Randolph County, Alabama, and sentenced to life without parole. This conviction was obtained nine months after Mr. Stephens allegedly participated in the events leading to this case (January 20, 1986). Nevertheless, the trial court used the Randolph County conviction as an aggravating factor and held that "the Defendant was previously convicted of a felony involving the use or threat of

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9. *See also* R–824 ("He's got not right to sit over there and claim there's something wrong with this case.")

violence to the person." *Sentencing Order*, July 24, 1989, p. 7 (Volume I, p. 171).

Under the Alabama capital sentencing statute, it is an aggravating circumstance that "[t]he defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person." Ala. Code § 13a–5–49. The plain meaning of this provision is clear from the language employed: the defendant must have been convicted of another violent crime prior to committing the capital offense charged. In the context of the seven other aggravating circumstances, it is also clear that the defendant must have been convicted of a violent crime at the time he commits the capital offense charged. Finally, the purpose of the aggravating circumstance — namely, to deter repeat violent offenders — is only served if the defendant was previously convicted and punished for the previous violent crime.

Accordingly, the trial court's reliance on a subsequent conviction to override the jury's verdict of life deprived Mr. Stephens of his rights to due process and to be free from cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and of Article I of the Alabama Constitution.

VII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING INTO EVIDENCE STATEMENTS OBTAINED IN VIOLATION OF MR. STEPHENS' FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

The trial court improperly admitted into evidence four statements of the defendant in violation of the Fifth, Sixth,

Eighth and Fourteenth Amendments. In the first statement, the defendant denied any participation in the crime and stated that he had been shot by Dennis Jones in Carollton, Georgia. R–636. The interview was given in a hospital in Carollton, Georgia. The State, however, never established that Mr. Stephens had knowingly and intelligently waived his *Miranda* rights at that first interview.[10] R–39 (no evidence that defendant waived his rights); R–28 (*Miranda* waiver only signed at third interview of January 25, 1986); R–57 (no evidence that defendant waived his rights); R–58 (same). As a result, the first statement was inadmissible for lack of a valid waiver and the three other statements were inadmissible as fruits of a poisonous tree. *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (State has burden of establishing a valid waiver); *Michigan v. Long*, 475 U.S. 625, 633 (1986) (same).

In addition, Mr. Stephens asserted his Fifth amendment rights on January 23, 1986, at the conclusion of his second statement. R–40 (defendant said "I don't want to talk about killing them two men anymore"); R–620 (same). Nevertheless, the State initiated two subsequent interviews. *See* R–46 (January 25, 1986) ("I believe I would think I called and asked the defendant to be brought forward to be interviewed); R–50–51 (January 28, 1986). The State failed to honor Mr. Stephens' assertion of his Fifth Amendment rights by initiating subsequent interviews, in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). *See also Michigan v. Jackson*, 475 U.S. 625 (1986) (*Edwards* established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights); *Minick v. Mississippi*, No. 89–6332, Slip Op. at 4 (December 3, 1990)

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10. Mr. Stephens was additionally in no condition to intelligently waive his right to counsel given his physical and mental condition at the hospital, his drug addiction and limited intellectual functioning.

(same). As a result, any subsequent waiver of the defendant's Fifth Amendment rights is invalid. *See Arizona v. Roberson*, 486 U.S. 675, 680–681(1988). The admission into evidence of the third and fourth statements, *see* R–627 and R–670, therefore violated Mr. Stephens Fifth, Eighth and Fourteenth Amendment rights.

CONCLUSION

Mr. Stephens' application for rehearing should be granted and his unconstitutionally obtain conviction and sentence of death overturned.

Respectfully submitted,

Blanchard L. McLeod, Jr.
622 Alabama Avenue
Selma, Alabama 36702

Counsel for Victor Stephens

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document has been served on counsel for the State of Alabama, Hon. Beth Slate Poe, Office of the Attorney General, 11 South Union Street, Montgomery, Alabama 36130, this 29th day of March, 1991.

_____

Blanchard L. McLeod, Jr.

Circuit Court of Hale County, Alabama

Closing Argument of Defense Counsel

Stephens Trial

Record 800–808

MR. MORRIS: If it please the Court, ladies and gentlemen of the jury, this is the last time I'll have an opportunity to speak to you and I'm quite confident that a lot of you are about ready for me to be quiet. I understand that. I walked into this courtroom for the first time in my life Monday. I saw a group of jurors who are faced with a mighty touch task and I know that. But a group of jurors who's not shurking their task.

The State is going to talk to you about confessions and I'm going to talk you about confessions. Now during the time that I'm talking with you, I hope I've — I have a tendency, and my wife says I have a tendency when I get excited, I get up a little louder. Now let me hasten to say that during the course of this trial if I've done something or not done something that you didn't approve of, I want you to tell me afterwards. Hold it against me, don't hold it against the individual that's been seated over there with me during this week. I want to talk to you basically about some things that he talked to you about in opening statements. Now ladies and gentlemen, one of the things that I've found that is if you'll be truthful with the jury, the jury will appreciate it. I told you that I didn't know whether or not Victor Stephens did these acts, and let me tell you again that I don't know. I believe you don't know either. Let me tell you about four things or the four reasons why I don't know. Let's start off with something right here.

If you'll recall that they found a pair of gloves when they searched the vehicle and if you will recall, the gloves, they didn't introduce them in evidence, but there was no shot mentioned of any — wasn't any shot in the gloves, either hand. So let's assume that that would lead you to believe that the reason, because of this smooth surface here, there are no fingerprints, that there are no Victor Stephens' fingerprints is because he had the gloves on, and that is not true. There wasn't any shot in the gloves. Of course, if he had the gloves on, he would have shot holes in the gloves and that wasn't true. Everybody agrees with

that. It's inconceivable that within 30 minutes, when a man is gripping, whoever it was, was gripping this weapon, if you believe Mr. Lawden Yates, the toxicologiest was gripping it here and here and here, that you wouldn't have the man's fingerprints on there, well, you did have the man's fingers on there. Don't be misled by that. The interesting thing is that they didn't have Victor Stephens' fingerprints on there because, as I said, did they compare the prints that they extracted from the handle of this gun with Victor Stephens? Yes. Did it match? No. That's the evidence before you. That's the State of Alabama's witness. How many people have got type B blood? Mr. Serologist, Mr. Forensic Scientist with the State of Alabama, with all its resources, 250,000 people, you can't convict on that. Tell me, Mr. Firearms Expert, and Mr. Ballistics Expert, tell me did that shot in Victor Stephens' hand come from that shotgun? I don't know. And they know, ladies and gentlemen. These are experts, supposedly. They knew they couldn't take the hand — the shot in the hand and match it up with this. They couldn't match the fingerprints and there's one other thing that ain't nobody mentioned and I want the man who's got the last shot to tell you about this too. If he can't, he can't. Why, Mr. Forensic Scientist, didn't you take that hat that he said from this witness stand that had hair in it and why didn't you take that one thing, you hadn't got the fingerprints? We dusted the cash register and we dusted the door and we dusted here and we dusted there and found the prints down here on this gun, but we've got a hat. Now I'm nervous, I have never done this before. I've never had a man's life in may hands before. I want them to tell you. Either that they took those — they knew to do that. They had that hat, standing right by the door, he said. Right next to the .25 caliber that had somebody else's fingerprints on it and then they took that hat in their possession. I submit to you of those two things, I don't know the answer. Hair is the easiest to match up. It's the easiest way to convince you, to bring evidence to you, to convince you beyond a reasonable doubt and to a moral certainty. Hair is unique. He

talked about the bore in this weapon. I submit to you that he said there is some that he just can't distinguish. Some he can't detect because it's microscopically hard to determine. I submit to you that your hair and my hair will match up if it's in another place every time and it's the easiest to do. Now, Mr. State of Alabama, if you want to make a case, and I say to you again, I don't know. But that's the one means available to them to let you know, and I don't know why they didn't match it, I'll never know that. I will not have an opportunity to do all of this. The State of Alabama has got all of those resources —

MR. GREENE: I object to that argument. This evidence is equal to both sides.

MR. MORRIS: It is not. The first I heard about it was on the witness stand.

THE COURT: Address your remarks to the Court.

MR. GREENE: Yes, sir; I'll address them to the Court.

MR. MORRIS: The first time I ever heard about that was right there on that witness stand. I filed the proper motions.

THE COURT: It's argument of counsel. Ladies and gentlemen, this is argument of counsel. I've instructed you earlier that this is not evidence and I'll instruct you further as to this as we go further. Continue.

MR. MORRIS: So then what we've got here, ladies and gentlemen, is the State is saying that you should invoke the death penalty. That's what they're asking for. You can cut it any way you want to, but that's what is before you, and will be before you. They're asking you to do that. They're asking you

to do that when they haven't got this fingerprint. When they can't identify by blood, when they can't identify by the shot and the one thing they they know that they can identify by is that hat and they never mentioned that. They don't bring that to you, yet they say convict.

Well, why do you convict? Oh, because he gave a statement. He gave a statement. I'll ask you to do this. I know you all will do it. When you get back in the jury room, I'd ask you to deliberate or think about two things. Think about the evidence without the statement. Think about the witness that says a man that robbed me, didn't say one or two. Now I told you in opening statements that he would say that there were two men. That was incorrect. I was incorrect on that. I apologize. But that's the way I understood it. I hadn't talked to Mr. Portis then at that time. But, "the man or men that robbed me were white. They were driving a red car." Now I suppose they're going to say to you, oh, don't beleive him, he was delirious. What if he was right? What if he was right? What if the man who saw it with his own eyes and then dismissed Mr. Portis and even Mr. Jim over here with the District Attorney's Office got before you and said we know Mr. Portis, he was telling the truth. Nobody doubts that Mr. Jessie Portis who came up here, that that was old to him. Nobody is doubing that Mr. Jessie Portis is telling the story. So if Mr. Jessie Portis isn't telling a story, I guess they're saying Adam Pickens is telling a story. I guess that's what they're saying. I don't know. They're going to get the last shot at you. Then we go to what they call the confessions. If I understood it correctly, it took four times to get it the way they wanted it. They go to the hospital the first time and I may be wrong about my dates, but I thought it was on the 21st. They say it's on the 20th. I thought Mr. Stone said he went on the night of the 21st which would have been on Tuesday. Y'all heard the evidence. He said he was shot in the hand by his girl friend's dad and that's what he said. That's what Mr. Stone said that he said. Then he placed him under

arrest and then two days later when he's in the jail, in the "hole" down there, they bring him up and then he gives an oral statement. It's an oral statement, not signed by Victor Stephens. He acknowledges it's not signed. I think he said it lasted two hours. Then he goes on. That's on a Wednesday and then on Saturday he goes back to the "hole", he goes back to the "hole" and for whatever reason on the following Saturday he brings him back. I believe they said at that time there were five officers present. Then he talks to them, as I understood it, for three hours. That's five hours longer than you have been here today. And then on the 28th which would have been on a Tuesday, he talked to the officers for four and a half hours, and that totals up to nine and a half hours.

I submit to you, ladies and gentlemen, and I'm going to sit down shortly, I submit to you the reason why they brought this person up there and ever what means were made to illicit a statement was that they knew they had no case without it. I further submit to you that many a person is in the penal system of the State of Alabama where a statement had been forced and forced and forced out of them with no validity or truthfulness. I have a heavy duty. I understand that duty. The burden has been on my shoulders. I'm passing it now to you. The judge is about to charge you that unless you're convinced beyond a reasonable doubt, you can't convict. It's not on the defendant to prove to you his innocence it's on the State of Alabama and I have never seen as many law enforcement officers out there or experts or forensic science people in my life sitting out there at one time. Why they did not tell you and match for you what was readily available at their disposal, only you can answer because you've got to guess. You've got to surmise and you've got to speculate. Under the law, you can't base a verdict on that. I'm confident when the State of Alabama proves their case to you beyond a reasonable doubt that you will convict. You should. But when the State of Alabama comes up here to

you and is looking for some scapegoat without sufficient evidence, you have just an equal obligation under the law and under our system that has worked for 200 years, to do the tough, to do the difficult, and when they fail to prove it to you, as they have failed in this case, you have just a greater duty to the defendant. Thank you.

Circuit Court of Hale County, Alabama

Judge's Instructions to Jury

Stephens Trial

Record 825–849

THE COURT: Ladies and gentlemen, at this point in the trial, it's my duty to instruct you as to the law applicable to this particular case. The Defendant in this case is charged, first in Count I of the indictment, with the offense of murder during robbery in violation of Section 13A–5–40(a)(2) of the Alabama Criminal Code. This offense is classified under the code as a capital offense. I'll read to you that portion of the indictment that relates to Count I. It states,

"State of Alabama,

Hale County,

March 24, Session, 1986

The Grand Jury of said County charge that before the finding of this indictment Victor R. Stephens, whose name is otherwise unknown to the Grand Jury other than as stated, did intentionally cause the death of Adam Pickens by shooting him with a pistol and Victor R. Stephens caused said death during the time that Victor R. Stephens was in the course of committing a theft of lawful money of the United States, a description of same being otherwise unknown to the Grand Jury, the property of James R. Bailey, doing business as J.R. Bailey Grocery Store, by the use of force against the person of Adam Pickens, or against the person of another present, to–wit: James R. Bailey, with intent to overcome his physical resistance or physical power of resistance, while the said Victor R. Stephens was armed with a deadly weapon, to–wit: a pistol, in violation of the *Code of Alabama*, 1975, Title 13A–5–40(a)(2),

against the peace and dignity of the State of Alabama."

The Defendant in this case is charged in Count II of the indictment with the offense of murder during robbery in violation of Section 13A–5–40(a)(2) of the criminal code and this offense also is classified as a capital offense. This count of the indictment reads as follows:

"State of Alabama,

Hale County,

March 24, Session, 1986

The Grand Jury of said County charge that before the finding of this indictment Victor R. Stephens, whose name is otherwise unknown to the Grand Jury other than as stated, did intentionally cause the death of James R. Bailey, by shooting him with a pistol and Victor R. Stephens caused said death during the time that Victor R. Stephens was in the course of committing a theft of lawful money of the United States, a description of same being otherwise unknown to the Grand Jury, the property of James R. Bailey, doing business as J.R. Bailey Grocery Store, by the use of force against the person of James R. Bailey, or against the person of another present, to–wit: Adam Pickens, with intent to overcome his physical resistance or physical power of resistance, while the said Victor R. Stephens was armed with a deadly weapon, to–wit: a pistol, in "violation of the *Code of Alabama*, 1975, Title 13A–5–40(a)(2), against the peace and dignity of the State of Alabama."

Signed, "Roy L. Johnson, District Attorney of 4th Circuit."

Now embraced within the offense of capital murder, as charged in both counts of this indictment, that is, Count I, as it relates to Mr. Pickens and Count II, as it relates to Mr. Bailey, is the lesser included offense of murder in violation of Section 13A–6–2 of the Alabama Criminal Code which is a class A felony. Now the Defendant in this case is charged in each count of the indictment with having committed a capital offense. A capital offense is an offense for which the punishment is either life imprisonment without parole or death. The law provides that if a defendant is convicted of a capital offense, additional proceedings will be held to determine whether his punishment is to be life imprisonment without parole or death. But you are not to concern yourselves at this time with any issue of punishment. Instead, the only determination you are to make at this time is whether the State has proven beyond a reasonable doubt that the Defendant is guilty of a capital offense as to Counts I and II or as to either count or of some lesser offense which I'll instruct you about later.

Now as to each charge against him of capital offense of murder during robbery as charged in Count I of the indictment and the capital offense of murder during robbery of Mr. Bailey as charged in Count II of the indictment and to the lesser included offenses of murder which are embraced within each count of the indictment, this Defendant has entered a plea of not guilty and not guilty by reason of self–defense. Now under the

doctrine of self–defense, a person may use deadly physical force in defending himself or a third person under these circumstances if he reasonably believes that such a person is using or about to use unlawful deadly physical force or committing or about to commit an assault in the first or second degree. As person is not, however, justified in using deadly physical force upon another person if it reasonably appears or if he knows that he can avoid the necessity of using such force with complete safety by retreating.

Additionally, a person is not justified in using physical force upon another person even under the circumstances if, one, he provokes such other person to the use of unlawful physical force with intent thereby to cause physical injury or death to another person, or, two, he was the initial aggressor except that his use of force upon another person under the circumstances is justifiable and if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the other person, nevertheless, continues or threatens the use of unlawful physical force. Now my duty in this charge is to try to define for you and direct your attention to the legal principals which govern this case. I must try to state the law to you plainly and accurately so you will comprehend the principals involved. The judge's duty in this case is to decide the law and it's your duty to determine the facts. I want you to understand that I have no opinion of the facts of this case. It's not my business to have an opinion. If I did have an opinion as to this case, it would be highly improper for me to intimate or suggest it to you. So I have no opinion of the facts of this case. I

don't want you to think from anything I have said or any ruling I have made in determining the law that I think one way or the other about the facts of this case. The determination of the facts does not come within my province. That is your sole and exclusive province, for you are the judges of the evidence in this case. It is of the highest importance in the administration of justice that we keep our two provinces separate. So bear in mind, ladies and gentlemen, that the weight and sufficiency of the evidence in this case is for you and not for the Court. When a defendant is placed on trial charged with the commission of a public offense, the law says that he's presumed to be innocent of the offense. This Defendant enters this trial with the presumption of innocence in his favor and it is a fact which is to be considered by you as evidence and should not be disregarded. This presumption of innocence remains with the Defendant during the trial until overthrown by evidence which convinces you, the jury, of the Defendant's guilt beyond a reasonable doubt. Now in this case, the burden of proving that the Defendant is guilty as charged rests upon the State and before a conviction can be had, the State must satisfy you of the Defendant's guilt. Unless the State so satisfies you of the Defendant's guilt beyond a reasonable doubt and to a moral certainty, then he's entitled to an acquittal.

Now the phrase "reasonable doubt" is for the most part self–explanatory and efforts to define it don't always clarify the term, but it may help you some to say that the doubt which would justify an acquittal must be an actual and substantial doubt

and not a mere possible doubt. A reasonable doubt is not a mere guess or surmise, it's not a forced or captious doubt. If, after considering all the evidence in this case you have an abiding conviction of the truth of the charge, then you are convinced beyond a reasonable doubt and it would be your duty to convict the Defendant.

Now the reasonable doubt which entitles an accused to an acquittal is not some mere fanciful, vague, conjectural or speculative doubt but a reasonably substantial doubt arising from the evidence and remaining after careful consideration of the testimony such as reasonable fair–minded and consciencious men and women would entertain under all the circumstances. Now you will observe the State is not required to prove the Defendant's guilt beyond all doubt. Few things in life are provable beyond all doubt, but simply beyond a reasonable doubt and to a moral certainty.

If, after comparing and considering all the evidence in this case, your minds are left in such a condition that you cannot say that you have an abiding conviction to a moral certainty of the Defendant's guilt, then you are not convinced beyond a reasonable doubt and the Defendant would be entitled to an acquittal. Now I read to you the indictment in this case. The indictment in this case is no evidence at all against this Defendant. It is merely the formal method under our constitution by which a defendant is accused of a crime and placed on trial. It provides no proof, no presumption, no inference that this Defendant is guilty of the offense charged therein.

In determining what the true facts are in this case, you are limited to the evidence that has been presented to you from the witness stand as opposed to the matters which have been stated by the lawyers in the course of the trial of this case. What the lawyers have said, both for the State and for the Defendant, is not evidence. What they have argued to you at various points in the trial is not evidence. They have a right, in fact, a duty at the appropriate time during the trial to comment on the evidence and draw reasonable inferences from the evidence as they argue their respective positions to you. But what they say is not evidence and you should put what they say in a proper category in you thinking and it should not be in the evidence category, just as the indictment in this case should not be in the evidence category.

If you are convinced beyond a reasonable doubt that the Defendant committed the crime of murder of the intentional killing type during a robbery in the first degree as alleged in both counts or in either count of the indictment, then it would be your duty to find the Defendant guilty of the capital offense.

Now the two components of the capital offense are robbery in the first degree and murder of the intentional killing type committed during robbery in the first degree.

The Defendant commits the crime of robbery in the first degree if he uses or threatens the use of force against the owner of personal property or any person present while in the course of — personal property with the intent to overcome his

physical power of resistance in order to compel his acquiescence in the taking of the personal property and in the course of said theft or in the attempt thereof, either, one, intentionally causes serious physical injury or death to a person or, two, is armed with a deadly weapon or dangerous instrument.

Now the words "in the course of committing a theft," means acts which occur in the attempt to commit or in the commission of theft or in the immediate flight after the attempt or commission. A person commits the crime of theft of property if he knowingly obtains or exerts unauthorized control over the property of another with intent to deprive the owner of his property. An attempt occurs when a person with intent to commit a specific offense, does any overt act towards the commission of the offense.

The statute uses the words "deadly weapon." A deadly weapon is a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious physical injury and that term includes, but is not limited to, a pistol, rifle or shotgun. Serious physical injury is physical injury which creates substantial risk of death or which causes serious and protracted disfigurement of health or protracted loss of function of any body organ. If, in this case you are convinced beyond a reasonable doubt that the Defendant committed the crime of robbery in the first degree as previously defined of Mr. James R. Bailey, then the first component of the capital offense as charged in the indictment would have been proven. Now, a defendant commits the crime of murder of the

intentional killing type if, with intent to cause the death of another person, he causes the death of that person or another person. A person acts intentionally with respect to a result or to conduct when his purpose is to cause that result or to engage in that conduct. The defendant must intentionally, as opposed to negligently, accidently, or recklessly cause the death of the deceased in order to invoke the capital statute. That applies both as to Count I, Mr. Pickens, and as to Count II, Mr. Bailey. The fact that someone dies or is killed during the course of a robbery, does not automatically provide that intent. The intent to kill must be real and specific in order to invoke the capital statute. To be a capital offense, the murder of the intentional killing type must have been committed during robbery in the first degree. During means in the course of or in connection with or in immediate flight therefrom. In this case, if you're convinced beyond a reasonable doubt that the Defendant committed the crime of robbery in the first degree as previously defined, and during the course of the robbery, committed the murder of the intentional killing type of Adam Pickens as to Count I, or/and of J.R. Bailey, as to Count II, or either of them, by the means alleged in the indictment, then the second component of the capital offense as charged in the indictment would have been proven. Therefore, if you're convinced by the evidence beyond a reasonable doubt that the Defendant committed the crime of murder of the intentional killing type as to Adam Pickens in Count I and as to J.R. Bailey in Count II or either or them by the means alleged in the indictment during a robbery in the first degree, then it would be your duty to find the Defendant

guilty of the capital offense charged in both counts or either of them as charged in the indictment.

On the other hand, if you're not convinced by the evidence beyond a reasonable doubt that the Defendant committed the crime of murder of the intentional killing type of Adam Pickens as to Count I and J.R. Bailey as to Count II or either of them by the means alleged in the indictment or if you are not convinced by the evidence beyond a reasonable doubt that said murder of the intentional killing type was committed during a robbery in the first degree as previously defined, committed by the Defendant, then the Defendant cannot be convicted of the capital offense charged in the indictment. Now as I previously instructed you, embraced within the charge of each count of the indictment is the lesser included offense of murder. A person commits the crime of murder if, one, he causes the death of another person, and in performing the act or acts which caused the death of the person he intended to kill that person or another person.

Now, as to Count I, to sustain the charge of murder in this case, the State, by the evidence, must prove beyond a reasonable doubt the following elements of the offense: one, that Adam Pickens is dead. Two, that the Defendant, Victor R. Stephens, caused the death of Adam Pickens. That is, that he died as a result of being shot by the Defendant. Third, that in committing the acts which caused the death of Adam Pickens, the Defendant acted with intent, and, four, that in doing the act which caused the death of Adam Pickens, the Defendant, Victor Stephens, was not

justified in using whatever physical force upon another person he reasonably believed was necessary in order to defend himself or a third person from what he reasonably believed at the time to be the use of imminent use of unlawful physical force by that other person.

Now, as to Count II, to sustain the charge of murder in this case, the State, by the evidence, must prove beyond a reasonable doubt, the following elements of the offense: One, that J.R. Bailey is dead. Two, that the Defendant, Victor Stephens, caused the death of J.R. Bailey, that is, that he died as a result of being shot by the Defendant. Three, that in committing the act which caused the death of J.R. Bailey, the Defendant acted with intent and, four, that in doing the act which caused the death of J.R. Bailey, the Defendant was not justified in using whatever physical force upon another person he reasonably believed was necessary in order to defend himself or a third person from what he reasonably believed at the time to be the use or imminent use of unlawful physical force by that other person. "With intent" means that it was the Defendant's purpose to cause the death of another person.

Now, ladies and gentlemen, expert witness have testified in this case and they've been permitted to express opinions or draw conclusions. In passing upon the facts, you are not required to accept conclusions or opinions of expert witnesses, but must determine for yourselves the weight to be given such testimony and evidence when considered in connection with all the other evidence material to

this issue. These witnesses have testified and expressed opinions based upon assumed facts, some of which were set forth perhaps in a hypothetical question. The weight to be accorded the testimony is dependent upon the truth of facts stated in the hypothetical question or questions and before considering the opinions, you should first examine carefully the material facts stated in the hypothetical questions and be reasonably satisfied that they have been substantially proven to be true.

Now what is an expert? Simply stated, an expert is one or an expert is one who, by education, training and/or experience has attained such skill, knowledge, or experience in some science, profession, business or occupation not of common knowledge to the average layman. Certainly, witnesses have testified and have been permitted to express opinions or draw conclusions. In passing upon these facts, you are not required to accept these conclusions or opinions of these witnesses, but must determine for yourselves, the weight to be accorded such testimony and evidence when considered in connection with all other evidence material to this issue. Some of the evidence in this case, of course, has been circumstantial evidence. The test of the sufficiency of circumstantial evidence is whether the circumstances as proved produced a moral conviction to the exclusion of all reasonable doubt of the guilt of this Defendant. That is, whether they are incapable of explanation upon any reasonable hypothesis consistent with the Defendant's innocence. There should not be a conviction upon circumstantial evidence unless, to a moral certainty, it excludes every other

reasonable hypothesis than that of the guilt of this accused. No matter how strong may be the circumstances, if they can be reconciled with the theory that the Defendant is innocent, then the guilt of the accused is not shown by the full measure of proof the law requires and the Defendant should be acquitted.

Now, ladies and gentlemen, all 12 of you must agree before you can reach any verdict in this case. Your verdict must be the verdict of each and every juror. You are the sole judges as to the weight that should be given to all the testimony in this case. As I told you, it's my duty to decide the law, it is your duty to decide the facts. I don't want you to think from any ruling I have made or in any of these charges, that I think one way or the other about the facts of this case. You take the testimony of the witnesses, all the proper and reasonable inferences therefrom, apply your good common sense, and in an impartial and honest way, determine what you believe to be the truth. You should weigh all the evidence and reconcile it if you can reasonably do so. But if there is irreconcilable conflicts in the evidence, you ought to take that evidence which you think is worthy of credit and give it just such weight as you think it's entitled to receive.

In doing so, you may take into consideration any interest which any witness might have been shown to have in the outcome of this case. If you believe that any material part of the evidence of any witness was wilfully false, you may disregard all of the testimony of such witness.

Now with regard to the alleged confession or statements of the Defendant in this case. You may consider all of the facts and circumstances surrounding the taking of the alleged confession or statement in determining the weight and credibility, if any, which you give to the alleged confession or statement. In exercising your exclusive prerogative of determining the credibility of the evidence or the weight to which the evidence is entitled, you shall consider the circumstances under which the confession was obtained, the means by which it was elicited, including the situation and mutual relations of the parties.

Now while I determine the voluntariness of the confession, you, the jury, determine its weight and credibility and you may disregard an alleged confession and you may disregard an alleged confession which is unworthy of belief or in which you entertained a reasonable doubt as to its truth.

Now the fact in this case that the Defendant did not testify cannot be considered in determining the Defendant's guilt or innocence and no inference nor conclusion should be drawn by you about that fact nor should that fact have any weight with you in reaching a verdict. Now as I stated to you in this case, there are two counts contained in the indictment charging this Defendant in Count I with the offense of murder of Adam Pickens during robbery and Count II with the offense murder of J.R. Bailey during robbery. You must consider the evidence as to each count separately and determine as to the charge contained in each count, whether the Defendant had been proved guilty of the offense charged therein beyond a

reasonable doubt. If you find from your consideration of all the evidence that the State has proved beyond a reasonable doubt each of the necessary elements of the capital offense of murder during robbery as to Count I of the indictment, then your verdict should be that you find the Defendant guilty of the offense of capital murder of Adam Pickens during robbery as charged in Count I of the indictment.

Now if, on the other hand, from your consideration of the evidence or lack of evidence, you are not convinced the State has proven each of the essential elements of the offense of capital murder of Adam Pickens during robbery beyond a reasonable doubt, then you must find the Defendant not guilty of the offense of capital murder as charged in Count I of the indictment. Now, as I told you, embraced within the offense of murder of Adam Pickens during robbery as charged in Count I of the indictment is a lesser included offense of murder. If, after your consideration of the evidence or lack of evidence, you are not satisfied that the Defendant is guilty of the principal offense of capital murder as charged in the indictment, then you must next consider the evidence as to the lesser included offense of murder and determine whether the Defendant has been proved guilty of such lesser included offense beyond a reasonable doubt. If you find from your consideration of all the evidence the State has proved each of these elements of the lesser included offense of murder beyond a reasonable doubt, then your verdict should be that you find the Defendant guilty of the offense of murder embraced within the charge of capital murder contained in Count I of

the indictment. If, on the other hand, from your consideration of the evidence or lack of evidence you are not convinced the State has proven the essential elements of the lesser included offense of murder beyond a reasonable doubt, then you must find the Defendant not guilty of the offense of murder of the lesser included offense contained in Count I of the indictment. Now also as to Count II of the indictment embraced within that offense of murder of J.R. Bailey during robbery as charged in Count II, is the lesser included offense of murder also. If, after consideration of the evidence or lack of evidence, you are not satisfied that the Defendant is guilty of the principal offense of capital murder of J.R. Bailey as charged in the indictment, you must next consider the evidence as to the lesser included offense of murder and determine whether the Defendant has been proved guilty of such lesser included offense beyond a reasonable doubt. If you find from your consideration of all the evidence the State has proved the elements of the lesser included offense of murder beyond a reasonable doubt, then your verdict should be that you find the Defendant guilty of the offense of murder embraced within the charge contained in Count II of the indictment.

If, on the other hand from your consideration of the evidence or lack of evidence you are not convinced the State has proven the essential elements of the offense of capital murder of J.R. Bailey during a robbery — of murder, the lesser included offense under the capital offense as charged in the indictment, then it would be your duty to find the Defendant not guilty of the offense of murder, a

lesser included offense under Count II of the indictment.

Now after you have received these instruments, you will be given forms for the recording of your verdict and you'll be taken by the bailiff to the jury room where you will begin your deliberations. When you have reached a verdict in this case, you will complete one of the forms in the form given to you and one of your number to be selected and designated by you will sign the verdict of the jury as the foreman or forewoman as the case may be. Again, the verdict returned by you must be the verdict of all 12 of you and when the verdict has been reached, it will be necessary for you to return to the Court and give your verdict.

In the meantime, until you have reached a verdict and it's been received by this Court and you have been discharged, it is absolutely necessary that all of you stay together and you will not separate even for a moment.

Now I have before me the jury verdicts as to each count in this indictment. I will read these verdicts to you. The order in which I read them to you, is the order in which they were handed to me. You will not think that I think one way or the other by virtue of what verdict form I read first.

"We, the jury, find the Defendant, Victor Remar Stephens, guilty of the capital offense of murder of Adam Pickens during robbery in the first degree as charged in Count I of the indictment."

"We, the jury, find the Defendant, Victor Remar Stephens, guilty of the Capital offense of murder of J.R. Bailey during robbery in the first degree as charged in Count II of the indictment."

"We, the jury, find the Defendant, Victor Remar Stephens, not guilty of the capital offense of murder of Adam Pickens during robbery in the first degree as charged in Count I of the indictment, but guilty of the lesser included offense of murder."

"We, the jury, find the Defendant, Victor Remar Stephens, not guilty of the capital offense of murder of J.R. Bailey during robbery in the first degree as charged in Count II of the indictment, but guilty of the lesser included offense of murder."

"We, the jury, find the Defendant, Victor Remar Stephens, not guilty as to the charge in Count I of the indictment."

"We, the jury, find the Defendant, Victor Remar Stephens, not guilty as to the charge in Count II of the indictment."

Now, before you begin your deliberations, it's necessary that we take up some matters outside your presence. Hopefully, that will be very short, but sit quietly for a moment.

Circuit Court of Hale County, Alabama

Discussion of Jury Charge Outside the Presence and Hearing of the Jury.

Stephens Trial

Record 776–787

THE COURT: All right. Ladies and gentlemen, we have to take up a matter outside your presence. It's now the noon hour and you've heard the evidentiary phase. The next remaining phase is the summation by the attorneys followed by the instructions from this court. Now we're going to go to lunch at this time.

While you're on break, you should not discuss this among yourselves or allow anyone to discuss it with you. Do not attempt to learn anything about this case while you're on break. So at this time, you're excused for lunch.

(Whereupon the Noon Recess was taken.)

(Whereupon the following proceedings were held out of the presence and hearing of the jury:)

MR. MORRIS: At this time Judge, the Defendant would renew its motion to exclude the State's evidence and in the alternative, to direct a verdict on behalf of the Defendant and we incorporate as grounds, the same grounds that were previously given to the Court.

THE COURT: Denied.

Now I'm going to charge on capital murder, I'm going to charge on murder during robbery of J.R. Bailey and Pickens and I'm going to also state to them that

embraced within that offense is the lesser included offense of felony murder.

MR. MORRIS: You said you were going to introduce the charge?

THE COURT: I'm going to read the indictment.

I'll read that right out of the charge book.

I tell them that the defendant in this case is charged in Count I with murdering during robbery of Adam Pickens and —

MR. MORRIS: I'm sorry, I didn't understand.

THE COURT: That each of these is a capital offense punishable by death. Embraced within that charge is the lesser included offense of felony murder and that the defendant having been charged with having committed a capital offense for which punishment would be his imprisonment, parole of death. I'll introduce his plea.

MR. MORRIS: I think there is a plea of not guilty and not guilty by reason of insanity.

THE COURT: The burden will shift to you on that.

MR. SULLIVAN: Your Honor, we move to exclude his defense of not guilty by reason of mental disease or defect. There's been absolutely zero evidence to that in this

matter and the jury should not even be instructed on that particular basis.

MR. MORRIS: Judge, I think the law of self–defense and the law of not guilty by reason of insanity is somewhat confused. The burden doesn't shift to me to prove self–defense.

MR. GREENE: This business of shifting probably is maybe a bad nomenclature.

MR. MORRIS: I don't believe the burden is on me to prove the plea of not guilty by reason of insanity.

THE COURT: I think the burden is on the State to negate it.

MR. GREENE: Self–defense is a whole new ball game here.

THE COURT: I'll announce the defendant's plea is not guilty and I suppose self–defense. Then as the elements of murder unfold, it will be that he was not acting in self–defense and then I'll define self–defense. Now the jury may wonder why I'm doing that, but I'll put it in there because he says when he walked in, Bailey started shooting, and he stuck his gun up and started shooting back. I guess under some broad theory, you can get that in.

MR. MORRIS: Are you charging out the not guilty by reason of insanity?

THE COURT: There's no evidence of that.

MR. MORRIS: Judge, there may be. In his plea, I mean, in his confession, he said that he was under acid and 8–balls of cocaine and I guess the question is, can a person labor under the voluntary influence of the controlled substance to the degree that he doesn't have the mental capacity to form the necessary criminal intent.

MR. GREENE: I don't think the evidence shows anything other than he indicated that he had been using some drugs. One of the statements — I don't think that raises any issue as to his insanity. There's no contention on his part that he didn't know what he was doing or he doesn't understand it. His statement was very clear about everything that did happen, as opposed to being unclear about it as a result of the drugs.

MR. MORRIS: It does not. His statement says, and I can't remember the details.

MR. SULLIVAN: Judge, there's not any evidence here of —

THE COURT: I don't see any.

MR. SULLIVAN: I don't see any, any way you look at it. The burden is on him and he hasn't established it. I don't think it should go to the jury at all on that issue.

MR. MORRIS: Are your charging that plea out?

THE COURT: I'm charging it out.

MR. MORRIS: We except.

THE COURT: All right. Then I'll talk about presumption of innocence, burden of proof on the State, and the jury pattern on presumption of innocence, pattern charge on burden of proof and pattern charge on reasonable doubt. I'll instruct the jury that the indictment in this case is not evidence. That the argument of counsel is not evidence. I'll read the indictment. I usually read the indictment at the very front end. It doesn't matter. But then I'll go into this pattern charge on capital murder.

(Whereupon on off–the–record discussion was held between counsel and the Court.)

MR. MORRIS: Let me ask the Court this. Wouldn't the Court find that there would be an inconsistent verdict if they returned an indictment on one count and not on the other in light of the evidence?

THE COURT: I think they can come back and say guilty on Pickens and not guilty on Bailey or whatever. Also embraced within the capital offense is the lesser included offense of murder. I'll have to instruct them on robbery, and I'll not go back into the elements of robbery again.

MR. SULLIVAN: You're saying in the murder itself, you're going into robbery?

THE COURT: Murder during robbery.

MR. SULLIVAN: Murder during robbery makes it capital.

THE COURT: No. It depends on when intent was formed. Murder during robbery can be noncapital.

My understanding of the law is that way. If he says we didn't go in there to kill anybody, just things went down wrong, the man started shooting and we shot back —

MR. SULLIVAN: No, sir. I disagree with you. I think the law is that if there's an intentional killing during the course of, which comes in the immediate flight of — when you're going in or while you're in the store when the — actually taking place, that you have a capital offense. I think that the difference, as far as the lesser include offense is concerned, is that on the murder charge that there was no robbery — that the jury is making the determination that there was no robbery. It was just an intentional killing.

THE COURT: It might tend to confuse them if I tell them that it was murder during robbery, capital, and murder during robbery, noncapital.

MR. SULLIVAN: I don't think so.

THE COURT: If they went in with the idea that they were going to rob and kill whoever was in there, that's capital. If they went in there and things went wrong, they didn't intend to go in there and —

MR. MORRIS: Well, the Defendant, he goes in there, supposedly to rob the guy and the deceased starts shooting —

MR. SULLIVAN: I don't think it matters whether he came in — if he comes in to commit a robbery and that robbery starts going bad and he decides to kill the folks or in fact if he robs the place and then he's going out of the door and you're all of a sudden — all of a sudden he has, during the robbery, turns around and says that, "I'm going to shoot them," I think it's capital. I don't think it makes any difference when it is. They don't have to come in with intent to kill them and rob them. I think there's adequate case law on that.

MR. MORRIS: I think I'm entitled to a manslaughter charge. That would go to Pickens. If you take his statement, you've got Bailey firing when he walked in. Now it can't be self–defense as to Pickens, Pickens isn't armed. Now I believe you can have an intentional killing of Pickens without all the other elements of murder which would amount to manslaughter. I'm not talking the homicide and all those

other things, I'm talking about what I used to call first degree manslaughter.

MR. GREENE: Let's assume for argument that he's totally innocent of any knowledge whatsoever and just walks in the store and he gets shot at and starts running firing. Well, under that theory, he's not guilty of anything, whether or not Adam Pickens was armed would be meaningless at that time because there's no evidence that Adam Pickens tried to defend, shoot or do anything and the guilty party therein would be Mr. Bailey who, under this theory was the perpetrator of the difficulty or the other defendant who starts the difficulty.

This man just walked into it and defended himself and whatever innocent bystander got shot would not be his fault. I don't think that would give rise to manslaughter. It would give rise to self–defense, but he was not intentionally trying to kill either party which would be an element of murder and provocation which, you know, which would drop it to manslaughter. But he was simply defending himself from an assault by Mr. Bailey. Now that's taking it in its best light. I don't see how manslaughter would come up. If you had some argument between them, some difficulty between them and Bailey went for his gun and he went for his and "Pop" got shot, that could well be manslaughter. If there

was no intent to rob, period, at all, I don't see manslaughter.

MR. MORRIS: I think I'm entitled to that, Your Honor.

THE COURT: I don't think there's any evidence to charge on manslaughter. Where does self–defense fit in to the capital charge?

MR. GREENE: Self–defense is self–defense. If he acted in self–defense, period. If he was defending himself as to the murder —

THE COURT: I think I've got to charge in the capital portion that they would have to find that he was not acting in self–defense.

MR. GREENE: I think, Judge, in the course of your charge, you would make reference to the fact that the defendant has entered a plea of not guilty and composed within that plea is his plea of self–defense. If the jury found he acted in self–defense in this whole thing, then, of course, they'll not find him guilty at all. I mean, they find no robbery, they find nothing. I mean, he's set upon.

Now maybe we're getting too far afield.

THE COURT: In the standard pattern murder charge, when you're charging on elements, you would say in order to find this defendant guilty, you must first find that

the State has proven beyond a reasonable doubt the following elements:

1. As to Count I, Adam Pickens is dead.

As to Count II, J.R. Bailey, or either of them are dead.

2. That the Defendant, Victor Stephens caused the death as to Count I, Adam Pickens, and as to Count II, J.R. Bailey. That he died as a result of multiple gunshot wounds inflicted by the Defendant. Third, that in committing the act which caused the death of, in Count I, Adam Pickens and in Count II, J.R. Bailey, or either of them, then the Defendant acted with intent. Then you would have to say that in doing the act which caused the death, the Defendant was not justified in using whatever force upon another person as he reasonable believed was necessary in order to defend himself. What he reasonably believed at the time to be the use of imminent — use of unlawful physical force by other persons and then you go into what the force was. Deadly force and safe retreat and all that. What I'm saying is, the first charge is going to be on capital murder. There's no mention in that charge as to any elements — of proving any elements of self–defense. What I'm saying is, at the conclusion or somewhere during the capital charge of murder during robbery in the first degree, should I exclude self–defense or does it only defend against

lesser included charge of murder. It would be as to both, wouldn't it?

MR. MORRIS: The whole thing.

THE COURT: Now encompassed within this plea is the plea of self–defense, and then define self–defense. Then I'll reiterate when I get back down to the elements of murder, —

MR. MORRIS: They need to understand, I think the jury needs to understand that self–defense is a, you know, a complete bar. It's a complete defense to everything.

THE COURT: I'll put that at the front. Now the problem I have is that self–defense is not available to somebody who is committing a robbery. It just ain't a defense. That's what I'm saying. I don't know whether it should come in the capital portion or not. If they find robbery, self–defense is not a defense.

MR. MORRIS: Judge, I would like to object and except to the fact that the Court is not going to give the manslaughter charge and I contend in light of the evidence here and I except to the fact that the Court is not going to give the charge concerning killing done in a reckless manner.

THE COURT: All right. Noted.

Circuit Court of Hale County Alabama

Proceedings Outside the Presence and Hearing of the Venire

Stephens Trial

Record 385–401

THE COURT: Ladies and gentlemen, we're about to the selection process which will take us, I estimate it will be 11:00 before we're ready to place the jury in the box. I'm going to place you on break until that time and while you're on break, you're not to discuss this case among yourselves or with anyone else or allow anyone to discuss it with you. If that fact occurs, you should make that fact known to the Court and I'll inquire of you whether anytime during the evening past, whether anyone had any contact or problems with this case at all. Did anyone contact you or attempt to contact you? If so, please make that known to the Court.

(Whereupon there was no response from the venire.)

THE COURT: All right. You're excused now until 11:00 with that instruction. Thank you.

(Whereupon the following proceedings were held out of the presence and hearing of the venire:)

MR. MORRIS: Judge, I would offer to the Court, a brief, or would bring to the Court's attention, a motion previously filed. The Court is aware of a *Batson* Motion, and making it known to the Court that the basis of the *Batson* Motion is that of the 22 jurors struck, which is not including the alternate, the first 21 were black. The other juror that was struck by the State was juror number 22, which was their last strike and they struck number 106,which was Mr. Wyatt. We feel like under the language, that it's clear that through the process of jury striking, that they have systematically excluded members of the black race. Further, for the record, my client is black and we feel like that is a violation of the *Batson* case.

THE COURT: What is the composition of the venire total?

MR. GREENE: As I understand it, it's seven white five black.

THE COURT: The jury as struck is seven white and five black.

MR. GREENE: I think so.

THE COURT: What is the composition of the venire as a whole?

MR. GREENE: We've got it right here. Mr. Corley, number 17 is a white male. Mrs. Ferguson is a white female. Ms. Fondren, number 29, is a white female. Mr. Brenstead, is a white male, Lyles is a black female, Marks is a black female, 82 is a black male, 92, Travis, is a black female, 94, Tucker, is a white female, and 96 is Beth Williams, and that's a white female, and 101 is Willie Williams, a black female, and the alternates are Michael G. Harris, number 38, a white male, and Mr. Tubbs, number 93, white male.

THE COURT: Who's the last juror struck?

MR. GREENE: Number 106, Mr. Wyatt.

THE COURT: Last Juror? The last juror, number 38, that was the last person struck period, was number 38, Michael G. Harris, by the State; is that correct?

MR. MORRIS: That's true, as an alternative.

THE COURT: All right. The composition of this jury is seven and five. Now depending on the alternates, it could be eight and four.

MR. GREENE: Eight and five if you keep the alternate.

THE COURT: All right. You've made a prima facie showing, justify your strikes.

MR. GREENE: First of all, we did not attempt to strike jurors solely because of their race. We did, however, strike jurors for reasons I would like to state in the record at this time. I'll try to take them in order and state those reasons as best I can.

We struck juror number 68, Mr. Mickens, his position on capital punishment, which, I think is already on record.

We struck juror number 4, Mrs. Ball, on her position on capital punishment.

We struck juror number 5, who's also a Ball, as I understood it. Mr. Ball, the information was that he had answered affirmatively on drugs, that is, that he, or some member of his family or some close personal friend being so involved. The information also received was that he was some sort of part–time preacher and that his son had been in some serious trouble dealing with drugs and/or criminal activity. That was from law enforcement investigation. Finally, he indicated he did not want to serve and would ask to be let off, as we understood it. Now number 76 was our next strike, and that was Mr. Patton, who had answered affirmatively on our question concerning previous knowledge or

association of any type of criminal offense. Our office had prosecuted him for night hunting. We seized his weapons and sold them and he had also been convicted of a DUI on other occasions. Number 47 was a Margaret Hood, and we struck her because she asked off and had quite a bit to say about lack of transportation and inability to get here and she was concerned and wouldn't be able to pay attention, etc. Finally, it seems as if she and her husband have a history or problem in the child support court. Her husband actually being prosecuted and even done some time in the jail with reference to that. Of course, our office handles the child support program. Now that was in Perry County, there was some type of connection, a cousin or something. That's the reason we're so familiar with them. Number 46 was a Mattie Hollifield. We struck her because she had been arrested and charged with worthless checks and similar type offenses on several different occasions.

We struck juror number 36, which was Carolyn Harris. The information gathered during voir dire was that she was young, single and unemployed and our information in our investigation prior to that was that her brother is a defendant or has been a defendant in a criminal case which is being prosecuted.

We struck juror number 87, Vinie P. Spence. The information was that her sons had been in some very serious criminal offenses. We just felt like she would not be a good State's juror in this case.

We struck juror number 49, Dorothy Johnson. Information from investigation was that she had been a defendant in small claims court and been served

with numerous civil suits. She was not particularly well thought of and recommended to us a juror to strike. In voir dire, she seemed to be extremely responsive to the Defendant's questions. I noticed that she was chewing gum and not particularly concerned about this and felt like she would not be a proper juror to serve on this jury.

Number 18 was our 10th strike, Betty Cottrell. She asked off this jury. She did not want to serve and she answered our questions with reference to involvement and knowledge of criminal activity in the affirmative. She indicated that she or someone very close to her had been charged with some criminal offense. Our next strike was number 80, Willie Pratcher. This is the juror who indicated that he lived in Atlanta and seemed to be interested in not serving. He was wearing sunglasses and that to me has always been a point. When I find jurors doing that, unless there's a real good reason for it, generally, they do not tend to make very good State jurors. he's the only one in that position. He also was sitting next to a Mr. Gray. Defense counsel brought to the Court's attention, of course, our attention at the same time, that Mr. Gray, a juror struck for his feelings on capital punishment, had approached defense counsel discussing or talking or making some comments about burying the guy or something of that nature and Mr. Pratcher seemed to have some type of relationship with him. I felt uncomfortable leaving him on the jury knowing the propensity of the Juror Gray to verbalize his position.

Number 59 was struck as our 12th strike. That's Miss Gracie M. Lewis. Our information is that she was single and unemployed. Also, our investigative

information indicated that her son had been involved in a death or a killing. Information was not clear as to whether it was some type of automobile accident or whether it was some criminal charge, but in any event, her son was involved in it in some manner and we felt like she could not stay on as a juror.

Our 13th strike was number 85, Willie Shelton. I think it's Shelton. This juror, in the course of individual voir dire, is from the community and, of course, was listed here, her marital status here, as separated. She was very insistent on that. She reported that she lives in this particular community and never heard anything about this case whatsoever. We find that extremely strange and based on that, felt like she should not remain as a juror in this case.

Number 97, Essie Lee Williams, on individual voir dire, she seemed to be familiar with the case which, being from the general area of this offense, that would seem to be a plus, but her individual voir dire, she seemed to be very concerned and communicated to us that she was well aware of the fact that one of the men had lived to tell all about it and she was waiting very much to hear that. Seemed to be very concerned about that. Of course, we're very familiar with the evidence in this case where there is a proposed dying declaration from the deceased, "Pop", indicated some words to the effect that some two white men did it. We felt that leaving her on the jury with anticipation of testimony would certainly be detrimental to us.

Our 15th strike was 102, Bertha L. Wilson. Sheriff's Office recommended this juror be struck. The

Sheriff himself indicated he had known her for quite a long time and felt that she was extremely anti–establishment. That her mother was considered by him to be a person he thought well of, but he was concerned with Mrs. Wilson. He believed that her husband had been previously in some type criminal trouble. We felt that during the voir dire, she seemed to be very unconcerned about this very serious matter that she was about. We struck her on that basis.

Our 16th strike was number 35, Annie Harris. She had reported from her information as being single, unemployed and relatively young. The note I made was that she knew nothing about the case.

Our 17th strike was number 98, and that was Kenneth L. Williams. Observations by our group in observing the jurors was that this man was once again, seemed to be involved with the juror, Mr. Gray. He seemed to be associating with him. His general appearance was very rough and we simply felt like the combination of the two justified and required us to remove him from the jury panel.

Our 18th strike was number 9, Ruby Lee Brown. Now she, according to our information, had had a husband who had been killed in a homicide. That seemed to be a plus. Sheriff's Office was very concerned that she was extremely negative about that particular case and we felt that leaving her as a juror would not be wise under these circumstances. She was not happy or pleased with the situation, that we should remove her, so we did.

Juror number 40, Mrs. Hayes, Lelia Hayes, getting to the point where some of these jurors had some

pluses. We were concerned about keeping her. Mrs. Hayes worked with Mrs. Bailey at the nursing home. However, the reaction during individual voir dire concerning that, she seemed to be totally removed from that situation and totally unconcerned about it and based on that, we felt there might be some animosity or something we didn't realize with Mrs. Hayes. We struck her on that basis. Number 43, Mrs. Hobson, was our next strike and this was a juror we had decided that we would leave on the jury or keep on the jury, we felt that she was all right, from our standpoint. However, our information was that she was requesting to get off the jury and had requested to get off the jury. She had had an invalid husband and the storm last night essentially removed her for those reasons. Otherwise, we would have kept her.

Our 21st strike was number 59 — 39, Sarah Harris. The information reported was that she had kins–people who had been in criminal trouble and though we had otherwise felt that she was all right, that information caused us to remove her. Juror number 106 was Mr. Wyatt, who had indicated he had been in criminal trouble and had been prosecuted at some point in time, though he was extremely positive in his individual voir dire, that information, we felt, required that he be removed.

MR. JOHNSON: He was a white male.

MR. GREENE: And juror number 38, was Mr. Michael Harris, who indicated that he had a cousin at some point in time, 15 years ago, that had been involved in some type of criminal activity and we struck him on that basis.

THE COURT: Is that all?

MR. GREENE: That concludes all our strikes. We would like to mention for the record that the defense strikes were of all white males or females, for whatever benefit that is.

THE COURT: Cross examination

MR. MORRIS: Judge, I'm not sure that I have any cross. I would make it known for the record on I think there were three people that they mentioned and that was Mr. Williams, Mr. Pratcher, and a Mr. Pratcher. Mr. Kenneth Williams and Mr. Willie Pratcher and one other individual that I believe the District Attorney eluded to as sitting near or being around Mr. Gray. I would make it known to the Court, I believe the Court would recall that during yesterday's continuous voir dire that lasted into the night, Mr. Gray was an occupant on the front roew with a Mr. Corley sitting on one side and a Mr. Collins sitting on the other. Both of whom were white. To my knowledge, there was not another black individual on the front row yesterday. So I would differ with the information of the State in that regard. Now the information that the District Attorney has concerning things like they had some relatives involved in some crimes, being in small claims court where they're been sued, matters like this, in light of the — the fact that the State said they didn't respond to any questions or didn't seem to know anything about it, we content that the jurors by comparison that were left on this case knew nothing about it. Starting with Mr. Grinstead, Mrs. Fondren, Mr. Corley, also responded that they knew nothing about it. A Mrs. Lyles responded that she knew something about

it. She was left. A black female. Now Mrs. Marks responded that she knew something about it, a black female. A Mr. Ryans responded that he knew something about it, a black male. A Mrs. Travis responded that she knew something about it, a black female. Mrs. Williams responded that she knew something about it, a black female, and our contention is that it's clear that the fact that someone knows nothing about it played no part and we contend that it was strictly on the basis of race in this matter.

As to Mrs. Ruby Lee Brown, she stated in voir dire that her husband was a victim of a homicide and that the victim was prosecuted and there would be no other — I believe she also responded — I believe she had a bumper sticker —I take that back, Your Honor. That's now true. I'm saying that there would be no reason in the world that I can think of why she would not be an excellent juror other than race. She was struck.

Further, we contend that the last four strikes that they enumerated, starting with Mrs. Brown are vague and very indecisive answers. For instance, Mrs. Hayes, number 19 strike, number 40 on the veniore list, stated that she knew Mrs. Bailey and that she knew her and knew her daughter and had an association with Mrs. Bailey who's in the nursing home where she's employed as well as knew her daughter well. No conceivable reason that the defense can find, no conceivable reason that the defense can find, no conceivable reason that she would not make an excellent juror for the State, other than the fact that she's black.

Now there's vague allegations on number 43, they say that her husband had been on some sort of problem. Mrs. Hobson, we content that's just a smoke screen there. And then one of the persons up here, he had some sunglasses on. The defense contends certainly that is no justifiable reason. Now that's all I have.

MR. GREENE: Our only response is that one of the first things as to Mr. Gray, it was reported to us and made quite some concern as to Mr. Gray this morning concerning who he might talk to. Now this is the information we got from the people we asked to try to pay attention. Now Mr. Williams, Gray, Patton and Pratcher, were sitting together this morning in the back of the courtroom. We felt that that might be a matter of concern. We point out for the record that the last, I think, five strikes for the State involved two white males we thought we had some problems with and three black females that we were concerned about. We also thought these three black females might make us good jurors, but we had reason, we felt, overrode our desires to retain them.

THE COURT: Is it your testimony as an officer of this Court that the reasons for striking were nonracial and not based upon the race of any particular juror?

MR. GREENE: It is, Your Honor. I think the jurors we have before us bears that out. There's black males serving, some five blacks in total. We have an abundance of females on this jury in a capital murder case. I think we've got a jury that well reflects, based upon peoples backgrounds, Your Honor, and on that basis, a fair racial mixture of males and females, black and white, in this community. We arrived at this through exhaustive and argumentative process.

MR. MORRIS: Could I inquire of the Court, and I am aware the Court is a native of this county, as to the racial composition of this county, approximately?

THE COURT: Approximately 55/45 black over white. Somewhere in that neighborhood. It could be 60/40. It changes from time to time. I don't know the population. The voter registration is not that — there's a little more white than black. Now that's county–wide, but I can't tell you the population.

MR. GREENE: Now while we're on that —

THE COURT: You had 54 or 57 from the total venire remaining.

MR. GREENE: We had 16 white males, 6 black males, 16 white females and 20 black females to strike from at the end, as I recall. Somewhere close to that.

THE COURT: All right. The Court finds that the motion is not well–taken and I'll overrule the motion.

APPENDIX E

Alabama Code §§ 13A–6–2 and 13A–5–40(b)

§ 13A–5–40. Capital offenses.

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomoy in the first or second degree or an attempt thereof committed by the defendant;

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty, regardless of whether the defendant knew or should have known the victim was an officer or guard on duty, or because of some official or job–related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger . . .

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined in section 13A–6–2(a)(1), but not as defined in section 13A.6–2(a)(2) and (3). Subject to the provisions of section 13A–5–41, murder as defined in section 13A–6–2(a)(2) and (3), as well as murder as defined in section 13A–6–2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

Ala. Code § 13A–6–2;

§ 13A–6–2. Murder.

(a) A person commits the crime of murder if:

(1) With intent to cause the death of another person, he causes the death of that person or of another person; or

(2) Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person; or

(3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree,

rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person.

(b) A person does not commit murder under subdivisions (a)(1) or (a)(2) of this section if he was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itself. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for, or preclude a conviction of, manslaughter or other crime.

(c) Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances, as provided by article 2 of chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by article 2 of chapter 5 of this title or any amendments thereto. (Acts 1977, No. 607, p. 812, § 2005)

Ala. Code. § 13A–5–40.